SUPREME COURT, U. S.

APR 8

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1510

LOUIS B. PACHECO and
JOHN N. FOUNTAIN, JR.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Louis B. Pacheco and John N. Fountain, Jr., pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, whereby that Court affirmed the convictions of the Defendants after a jury trial.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported in 489 F.2d 554 (1974). The Order denying the Petition for Rehearing filed in behalf of both Petitioners herein appears in the Appendix hereto (A-39).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 8, 1974. A timely filed Petition for Rehearing was denied on March 7, 1974, and this Petition for Writ of Certiorari was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented by this case are as follows:

I.

DOES THE APPLICATION OF "WHARTON'S RULE" PROHIBIT THE UNITED STATES OF AMERICA FROM CHARGING AND THEREAFTER PROSECUTING AN INDIVIDUAL FOR VIOLATING TITLE 18, U.S.C. § 371 AND TITLE 18 U.S.C. 1955, 2?

II.

WHETHER THE COURT ERRED IN ADMITTING IN EVIDENCE WIRE INTERCEPTS 71-07 AND 71-07(A) (FOX TAPS) DUE TO THE PROSECUTOR'S INTENTIONAL SUPPRESSION OF INFORMATION REGARDING THE ACTIVITIES OF A SIGNIFICANT CONFIDENTIAL INFORMANT FROM THE AFFIDAVIT USED TO OBTAIN THE WIRE INTERCEPT ORDER WHICH AFFIDAVIT THEREBY FAILED TO SATISFY THE REQUIREMENTS OF TITLE 18, § 2518 (3)(c)?

III.

WHETHER THE COURT ERRED IN DENYING THE MOTION TO STRIKE THE KEY

PROSECUTION WITNESS' TESTIMONY IN ACCORDANCE WITH THE PROVISIONS OF TITLE 18 § 3500(d) WHEN:

1. AFTER INDICTMENT OF PETITIONERS THE WITNESS WAS INTERVIEWED BY AN FBI AGENT TWO (2) OR THREE (3) TIMES FOR TWO (2) TO THREE (3) HOURS EACH TIME.

2. EACH SUCH INTERVIEW WAS MECHANICALLY RECORDED ON TAPE.

3. BEFORE THE TRIAL HEREIN THE PROSECUTOR DIRECTED THE DESTRUCTION OF THE TAPE RECORDINGS.

4. THE RECORDINGS WERE NEVER TRANSCRIBED IN WHOLE OR IN PART.

5. THE INTERVIEWS RELATED TO THE WITNESS' DIRECT EXAMINATION DURING THE TRIAL.

6. PETITIONERS WERE NEVER PROVIDED WITH A VERBATIM OR SUBSTANTIALLY VERBATIM TRANSCRIPT OR MEMORANDUM OF THE INTERVIEWS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

Section 1. Privileges and immunities.

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

18 U.S.C. § 2518. *Procedure for interception of wire or oral communications.*

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that —

* * *

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous?"

18 U.S.C. § 3500. *Demands for production of statements and reports of witnesses.*

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any

statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

"(d) If the United States elects not to comply wih an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

* * *

"(a) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or"

STATEMENT OF THE CASE

Petitioners, Louis B. Pacheco and John N. Fountain, Jr., were tried by a jury after indictment and found and adjudged guilty of violation of Title 18 § 371 and Title 18, § 1955, U.S.C. Mr. Pacheco was sentenced to a probationary term, and Mr. Fountain was sentenced to a six-month term in jail to be followed by a probationary term.

Petitioners were indicted on two Counts with violation of Title 18, U.S.C., §2, §371 and §1955. The Indictment consisted of 31 pages.

During the course of pre-trial proceedings, Petitioners, through their respective attorneys, moved to dismiss the conspiracy count of the Indictment, or, in the alternative, require the Government to elect on which count it would proceed to trial contending that the Indictment as drawn violated "Wharton's Rule." 2*F. Wharton, Criminal Law* § 1604, at 1862 (12th Edition 1932). The Court denied the aforesaid motions and Petitioners proceeded to trial on all Counts of the Indictment. Petitioners raised before the Fifth Circuit Court of Appeals the aforesaid contentions, but said Court rejected same and affirmed the convictions.

During the course of the trial, the Government presented, over objection, recorded telephone intercepts, one of which intercepts related to the telephone of William Fox and purported to contain a conversation between Mr. Fox and Petitioner Fountain.

The intercepted telephonic communications came about as a consequence of affidavits prepared by representatives of the Florida Department of Law Enforcement that were presented to Governor Askew, who applied to Justice Adkins, Florida Supreme Court, for an order authorizing the intercepts which orders from time to time were issued. The last order relating to the "Fox Tap" was entered on October 1, 1971, and said tap terminated on October 27, 1971, at which time many of the Defendants charged in the Indictment were arrested.

In the application to Justice Adkins, there was an affidavit prepared that stated, amongst other things, that all usual investigative techniques had been used or accomplished.

Prior to the preparation and submission of the affidavit, on September 18, 1971, for the "Fox Tap" the affiant on said affidavit, together with representatives

of the Florida Department of Law Enforcement, met with the Federal prosecuting officials, namely, Bernard Dempsey, an Assistant United States Attorney, and Philip Smith, FBI agent, at which time a request was made by the state officials for the Federal Government to take over the contemplated prosecution of the persons who were the subject matter of the state investigation. Shortly after the aforesaid request, and before the execution of the affidavit for the "Fox Tap," the state officials were advised by Mr. Dempsey that the Federal Government would take over the prosecution of the persons under investigation, and as evidenced by the proceedings below that was forthcoming and accomplished.

From about July, 1971, up until October, 1971, Beverly Mathews, who appeared as a key prosecution witness herein, who was a confidant, lover and bookkeeper of the principal Defendant, Harlan Blackburn, acted as an informant, in regard to the matters that ultimately were the subject matter of the Indictment herein, for Philip Smith, FBI agent and Bernard Dempsey, Assistant United States Attorney, and the fact that she was acting in that capacity, providing tangible evidence to the FBI and the prosecutor's office, aside from reporting to said persons, was purportedly never made known to the officials of the Florida Department of Law Enforcement. Accordingly, in the affidavit for the "Fox Tap" presented to Justice Adkins there was never any disclosure of the role being played and information being furnished by Beverly Mathews, although as previously indicated prior to the time of the preparation of that application and execution of that affidavit, the Federal officials had agreed to take over the prosecution of this matter and immediately proceeded so to do.

At all times material to these proceedings, Beverly Mathews was available as a witness to the Federal Government, and when she was first specifically asked to appear as a witness for the Federal Government against the Defendants, she readily agreed to do so.

In December, 1971, after the Indictment of Petitioners and their arrests, and after Mrs. Mathews had agreed to appear as a witness for the Federal Government, she was interviewed by Philip Smith, FBI agent, who tape recorded two or three interviews with her, which interviews each lasted two to three hours. The reason given for the procedure followed by Mr. Smith was that Mrs. Mathews was providing so much information in such great detail and so fast that he was unable to, by hand, record everything she had to say. Prior to the time of trial, the prosecutor herein, Mr. Dempsey, directed the erasure of the tapes, although the tape recordings had not been transcribed, in whole or in part, and the erasure of the tapes and the destruction of the interview as directed by the Federal prosecutor, was not consistent with the usual procedures followed by the Federal Bureau of Investigation. All that was provided to counsel for Petitioners herein under the requirements of Title 18, U.S.C. § 3500, were some notes made by Mr. Smith during the course of the aforesaid taped interviews, that in no way purported to be a substantially verbatim transcript of those interviews, nor did said reports contain the language of the witness Mathews, in whole or in part.

REASONS FOR GRANTING THE WRIT

The qualification for review on certiorari, as specified in Rule 19 of this Court, are abundantly and compellingly fulfilled by the case at bar.

I.

The holding of the trial court and of the Court of Appeals that "Wharton's Rule" is inapplicable to Indictments charging both a violation of Title 18 U.S.C. § 1955, and Title 18, U.S.C. § 371, is not only in conflict with the decision of another Court of Appeals and a District Court, but is also, in effect, an invitation to this Court to decide an important question of Federal Law which has not but should be decided by this Court.

May the Government charge and prosecute five or more Defendants with a conspiracy to conduct an illegal gambling business in violation of Title 18 U.S.C. § 1955, and also charge the same Defendants and prosecute them with the substantive offense of conducting an illegal gambling business in violation of Title 18, U.S.C. § 1955 and § 2?

Section 1955, Title 18, U.S.C., requires the concerted action of five *or more* persons to constitute an illegal gambling business. The statute is quoted as follows:

"(b) As used in this Section -

(1) 'illegal gambling business' means a gambling business which -

(i) is a violation of the law of a state or political subdivision in which it is conducted;

(ii) *involves five or more persons* who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." (Emphasis supplied.)

This Court has consistently recognized the rule that the commission of substantive offense, and a conspiracy to commit it are separate and distinct offenses. See *Pinkerton v. United States,* 328 U.S. 640 (1946). Petitioners urged before the trial court and before the Fifth Circuit Court of Appeals that an important exception to this doctrine is the rule of law commonly known as "Wharton's Rule." This rule is stated as follows:

> "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission."

Anderson, 1. *Wharton's Criminal Law and Procedure,* Section 89, page 191 (1957).

The theory behind the rule is that where certain crimes require the concerted action of two persons these persons cannot be charged with conspiracy to commit the offense. The conspiracy is such an integral part of the substantive offense or is merged into the substantive offense so that the two cannot be considered separate offenses. See *Gebardi v. United States,* 287 U.S. 112 (1932); *United States v. Dietrich,* 126 Fed. 664, 667 (C.C. Neb. 1904). To charge the defendants with both the substantive crime and the conspiracy to commit the crime would be grossly improper for the substantive offense cannot in law or fact be committed without a conspiracy. Thus, conspiracy is an inherent element of the substantive crime and in keeping with the dictates of due process of law should not be made an additional crime. *Hunter v. United States,* 478 F.2d 1019 (7th Cir. 1973, cert. denied U.S. Sup. Ct. 1974); *United States v. Greenberg,* 334 F.Supp. 1092 (N.D. Ohio 1971).

Conspiracies are made punishable because of the increased danger involved in a group offense. A conspiracy is a separate crime because it is felt that when two or more persons combine to accomplish a criminal purpose, the added element of combination is sufficiently evil to be punished separately. Irrespective of the foregoing and the recognition generally of the appropriateness of charging defendants with substantive offenses and conspiracies, this Court has stated that it will view with disfavor attempts to broaden the scope of conspiracy prosecutions. *Grunewald v. United States*, 353 U.S. 391 (1957). When considered in this context, "Wharton's Rule" presents itself as a logical limitation on the use of conspiracy charges by prosecutors when that conspiracy charge is coupled with the substantive offense set out in Title 13, U.S.C. § 1955.

In *United States v. Hunter*, 478 F.2d 1019, 1025 (1973), the Court applied "Wharton's Rule" and held the defendants therein could not be charged with a conspiracy to violate § 1955. The Court stated:

> ". . . Both multi-person situations fell within Judge Learned Hand's statement that 'when the crime, which is the object of the putative conspiracy, requires for its commission some reciprocal acton of the conspirators indicted, they may not be indicted for conspiring to commit it if they have in fact consummated it. This is because the crime presuppose their mutual agreement which was therefore a part of it' *United States v. Center Veal & Beef Co.*, 162 F.2d 766, 770 (2d Cir. 1947)
>
> "In his earlier opinion in United States v. Zeuli, 137 F.2d 845, 846 (2d Cir. 1943), Judge Hand had summarized the rule as follows:

'Lower Federal courts have several times decided that, if a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it. *United States v. Dietrich, C.C.Neb.,* 126 F. 664 (Van Devanter and Munger, JJ.); *United States v. New York Central & H. H. R. R. Co.,* C.C., 146 F. 298 (Holt, D. J.); *United States v. Sager,* 2 Cir., 49 F.2d 725, 727, 728. Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled law. *United States v. Katz,* 271 U.S. 354, 355, 46 S.Ct. 513, 70 L.Ed. 986; *Gebardi v. United States,* 287 U.S. 112, 122, 53 S.Ct. 35, 77 L.Ed. 206, 84 *A.L.R. 370.* Therefore, if the conspiracy was confined to the transaction between Zeuli and Steneck by which the stolen books were sold, although both were guilty of the substantive crime, neither was guilty of conspiracy. The indictment was not so confined; it laid a single conspiracy which comprehended not only the disposal of the books but the original theft of them. Such a conspiracy was not within the doctrine we have just mentioned, for it covered more than the crime of receiving.'

" In the case before us, both alleged offenses require 'the mutual cooperation' or the 'recriprocal action' of a plurality of persons. The conspiracy charged in Count I is confined to the transactions described in Count II as a violation of § 1955; the conspiracy covers nothing more than the substantive crime committed by the conspirators. There is no suggestion that the proof of intent required for the violation of § 1955 is any different from the evidence required to sustain the charge of conspiracy."

". . . We find 'no ingredient in the conspiracy (charged in Count I) which is not present in the completed crime (charged in Count II).' *Pinkerton v. United States*, 328 U.S. 640, 643, 66 S.Ct. 1180, 1182, 90 L.Ed. 1489."

Applicable rules of statutory interpretation must be given force and effect when dealing with the question herein. Under the "rule of lenity", *Bell v. United States*, 349 U.S. 81 (1955), all ambiguities in penal statutes must be resolved in favor of a defendant. "This policy of lenity means that the Court will not interpret a Federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 168 (1958).

Although this Court in *Callanan v. United States*, 364 U.S. 587 (1961), did not apply the rule of lenity in regard to a conspiracy, the significant dictum of the Court on page 597 should be given meaning and effect herein:

> "Here we have no such dubieties within the statute itself. Unlike all of these cases, the problem before us does not involve the appropriate unit of prosecution . . . *nor is it an open question whether conspiracy and its substantive aim merged into a single offense.*" (Emphasis added.)

Applying the aforesaid legal principles, the ambiguity found herein should be resolved in favor of the Defendants.

The Government contended in the trial court and before the Court of Appeals that the five-person requirement in § 1955 is a mere jurisdictional element of

the crime and does not go to the essence of the offense itself. This argument has been accepted not only by the Fifth Circuit Court of Appeals, but also in the case of *United States v. Becker*, 461 F.2d 230 (2d Cir. 1970); *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973); and *United States v. Iannelli*, 477 F.2d 999 (3rd Cir. 1973).

An essential element in the Government's case, under § 1955 and in the case below, was that five or more persons were involved in the gambling business. Thus, group activity is a necessary element of the offense and an individual proprietorship of a gambling activity would not fall within the ambit of this statute. Once the "five person requirement" was put in the statute, for whatever purpose, this requirement becomes a requisite and necessary element to prove the crime of group activity. A group conspiracy is a necessary prerequisite to the commission of the substantive offense by any one of the Defendants charged including Petitioners. It is to this precise situation to which "Wharton's Rule" directs itself, and its application dictated a dismissal of the conspiracy charge and the elimination of evidence admitted against Petitioners under said charge.

II.

In Holding that the trial court did not err in admitting into evidence the "Fox Taps" irrespective of the prosecutor's intentional suppression of information to be included in the Affidavit used to obtain the wire intercept order, which Affidavit therefore did not comply with the requirements of Title 18, U.S.C. Section 2518 (31(c), the Appellate Court rendered a decision in conflict withe decisions of other District Courts, but it also, in effect, extended an invitation to this Court to decide an important question of Federal law, which has not been but should be decided by this Court.

A Motion to Compel the Disclosure of All Evidence Favorable to Defendants was timely filed in the trial court and an Order was entered granting said motion.

Irrespective of the foregoing, prior to the inception of the trial, there was never disclosed to any of the Defendants the fact that Beverly Mathews had been acting as a Federal informant since June 1971.

Pursuant to timely Motions to Suppress, testimony was taken by the Court to consider the priority of the circumstances of the issuance of the Court-ordered wiretaps, and on March 30, 1972, the Court entered an Order denying the suppression motions, and subsequently, by Order dated October 10, 1972, a Supplemental Order was entered denying the several Motions to Suppress (which gave effect to a hearing before the Court at Jacksonville, Florida, on April 20, 1972).

The Order of the Court of October 10, 1972, (A. 2-6) made certain findings:

> "The state in this case had sufficient information about the initial wiretap subjects to realize that a large scale lottery operation was being conducted, which, by its very nature, necessarily involved a hierarchal conspiracy. *The Defendants point to no evidence that was available to the state through normal investigative techniques to pierce the veil of the conspiracy.*"

The aforesaid finding was shown by an evidentary hearing to be wholly inaccurate.

During the trial, Beverly Mathews took the witness stand in behalf of the government and then, *for the first time*, it became apparent that she started to work as an informant for the FBI in June of 1971 (App. pg. 40-43)

She continued in that capacity up until the time that she testified at trial (App. pg. 40-43). The relationship between Beverly Mathews and the person against whom the initial intercept was directed, namely, Harlan A. Blackburn, was that of lover, secretary, confidant, and general partner in the criminal activities engaged in by Mr. Blackburn (App. pg. 43-63, 64, 65).

After Mr. Blackburn was in the marshall's custody as a result of a Federal conviction (during the course of which he was hospitalized), Mrs. Mathews received communication from him relating to his criminal activities in written form and otherwise, which documents she made available to the FBI and the prosecutor by either providing them with the original said documentation or copies thereof. (App. pg. 66-70).

Mrs. Mathews was prosecuted by the prosecutor in this case, Bernard Dempsey, for perjury and received a 5-year sentence from which an appeal was taken. *United States v. Roberts,* 455 F.2d 930 (5th Cir. 1971). At about the time that the Fifth Circuit Court of Appeals affirmed the conviction, Mrs. Mathews (Roberts) decided to become a Federal informant and contacted FBI Agent Philip Smith. At that time, she made a request to be advised who might adequately represent her in connection with her appellate proceedings and any matters relating to possible reduction of sentence. (App. pg. 71-77).

The FBI agent who was receiving the information from this confidential informant inquired of the prosecutor, Bernard Dempsey, who he might suggest to be the best attorney to suit the needs and purposes of the informant. A recommendation was made by Mr. Dempsey and said attorney was immediately thereafter retained by Mrs. Mathews (App. pg. 71-77, 78-80).

Mr. Stichter, a former Assistant United States Attorney, filed a Petition for Writ of Certiorari in this Court and after this was denied he and Mr. Dempsey advised the sentencing judge of the cooperation of Mrs. Mathews with the Federal government; and, as a consequence, she received a 90-day sentence at Alderson Virginia (App. pg. 65, 73-78).

While all of the foregoing was occurring, the Florida Department of Law Enforcement (hereinafter referred to and identified as "FDLE") was conducting an investigation into the gambling activities of William Fox and Harlan Blackburn. As a consequence of this and incidental thereto, certain applications for wire intercepts were sought and obtained. (App. pg. 79-84, 85-86). It should be noted that an FBI informant furnished part of the information that led to the issuance of one of the wire tap warrants (App. pg. 87). In September, 1971, the agents in charge of the FDLE, together with their counsel, approached Bernard Dempsey and FBI Agent Philip Smith with a view in mind of having the Federal government take over the continued and further investigation of Mr. Blackburn and Mr. Fox and their associates, and to prosecute federally all persons who may be criminally involved with them. (App. pg. 79-84, 87-95, 86, 87, 95-100, 85, 86).

Shortly after the meeting, a decision was made by the Department of Justice and the FBI agreeing to take over the investigation and prosecution on a federal level of all people involved with Mr. Blackburn and Mr. Fox, and that decision was communicated to the FDLE and their attorneys. (App. pg. 100-104).

Subsequent to the decision hereinabove set forth and the communication of advice to proceed on a Federal basis, the last applications for a wiretap warrant

on the William Fox phones were sought. (App. pg. 101-108). A representative of FDLE certified to Justice Adkins consistent with the requirements of Title 18, Section 2518 (3) (c), in regard to the employment of normal investigative procedures and their lack of success in which Affidavit he did not make any reference whatsoever to Beverly Mathews, the substantial number of tangible documents ultimately introduced in evidence she had provided nor the many oral incriminatory statements she had made to the FBI and the prosecutor. As a matter of fact, said Affidavits simply stated that normal investigative procedures had been tried and had failed, or reasonably appeared to be unlikely to succeed if tried. In light of the role played by Mrs. Mathews prior to preparation of the Affidavit in question said Affidavit was false. To contend that Mrs. Mathews was not available as a witness and ready and willing to appear as a witness in any Federal prosecution is ludicrous as the record in the proceedings below reflects.

"Q. Mrs. Matthews, you related to us in the past two days that sometime before July of 1971 when you became an FBI informant, as a result of a contact that you made to Phil Smith?

A. Yes, sir.

Q. From the FBI' is that right?

A. Yes, sir.

. . . .

Q. Then from time to time an informant — from time to time you met over a period of weeks or months in order to unburden yourself to him of all of the past activities that you had been involved in?

"A. I told him everything that I knew, yes, sir.

. . . .

Q. In August of 1971, didn't you have occasion to meet with the prosecutor, Mr. Dempsey, and Mr. Smith?

A. Yes. After I talked to Mr. Smith, I believe — I don't know what his conversation was with Mr. Dempsey, but the two of them then would meet with me.

Q. You had already been prosecuted by Mr. Dempsey some months before?

A. Yes, sir.

. . . .

Q. Did you know whether or not they were developing a case for prosecution against the people you had spoken about?

A. I just was kind of working under cover and giving them information. I really wasn't too concerned what they were doing with it.

Q. Now, could you tell me when it was that the first discussion was had, if it ever was had, as to whether or not you would appear as a witness against any of the people whom you were giving information about this matter? I am not talking about other matters, but —

"THE COURT: He wants to know when was the first time you ever discussed with Mr. Dempsey and Mr. Smith the possibility of being a witness against these defendants.

A. I don't know the exact time — as this case progressed? I told them any way I could help them, I would, I don't remember the time.

Q. Therefore, are you telling me that if your services were needed in any respect that you were willing to cooperate and participate in behalf of the Government?

A. Yes, sir.

"Q. You were concerned, you were frightened, but you were still willing to cooperate and participate in any way you were needed so to do?

" Yes, sir."

All of the witnesses presented by Petitioner in connection with the Motion to Suppress the Introduction Into Evidence of the "Fox Tap" agree that the first time Beverly Mathews was asked to testify as a government witness against the Defendants, she agreed (App. pg. 82, 103-112).

It is interesting to note that the question was posed to her contemporaneous with termination of the "Fox Tap" on or about October 27. 1971, when the Defendants were arrested on the Indictment for which they were ultimately prosecuted.

There can be no doubt of the fact that if the Affidavit for the "Fox Tap" was prepared by a Federal Agent or employee in light of the facts known to the FBI and to the United States' Attorney's Office, and that Affidavit did not disclose the nature and extent of the availability of information provided by Mrs. Mathews, the falsity of that Affidavit would unquestionably result in a suppression of the intercepted telephone communications arising from the warrant issued pursuant to the application.

In the case of *Elkins v. United States,* 80 Sup. Ct. 1437, 364 U.S. 2065 (1960), this Court was concerned with an issue that is analogous to the problem herein presented. This Court found that the rule excluding in Federal criminal prosecutions evidence obtained by Federal Agents in violation of a Defendant's constitutional rights was:

> ". . . calculated to prevent, not to repair, its purpose is to deter — to compel respect for constitutional guarantee in the only effective available way — by removing the incentive to disregard it."

This Court adopted the reasoning of Justice Jackson who discussed the considerations to be given to evidence obtained in violation of constitutional guarantees:

> "Courts can protect the innocent against such invasions indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." *Brinegar v. United States,* 338 U.S. 106, 181, 69 Sup. Ct. 1302, 1313, 93 L.Ed. 1879, dissenting opinion.

and then concluded that state police actions are to be governed by Federal standards:

> "Evidence obtained by state officers during a search which if conducted by Federal officers, would have violated Defendant's immunity from unreasonable search and seizure under the Fourth Amendment is inadmissible over the Defendant's timely objection in a Federal criminal trial . . .
> "The test is one of Federal law neither enlarged by what one state court may have countenanced nor diminished by what another may have suppressed."

Viewed in the context of the law above cited, we then turn to the requirements of Title 18, U.S.C., Section 2518 (3) (c), to determine whether or not the statutory provisions dictating the minimum requirements that must be complied with before a wiretap warrant will issue by a Federal Judge is present in this case. The legislative history concerning need to tap is set out in 1968 *U.S.C. Cong. Admin. News* 2190:

"Subparagraph (c) requires a full and complete statement as to whether or not normal investigative procedures have been tried and have failed or why these are unlikely to succeed if tried, or to be too dangerous. This requirement is patterned after traditional search warrant practice and present English procedure in the issuance of warrants to wiretap by the Home Secretary. Compare Report of the Committee of Councillors Appointed to Inquire into the Interception of Communication, par 64 (1957); *Read v. Case,* 4 Conn. 166 (1822). The judgment would involve a consideration of all the facts and circumstances. Normal investigative procedure would include, for example, standard visual or aerial surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants and the infiltration or conspiratorial groups by undercover agents or informants. Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. See *Giancana v. United States,* 352 F.2d 921 (7th, certiorari denied, 86 S. Ct. 437, 382 U.S. 959 (1965); *New York v. Saperstein,* 2 N.Y. 2d 210, 140 N.E. 2d 252 (1957). What the provision envisions is that the showing be tested in a practical and commonsense fashion. Compare *United States v. Ventresca,* 85 S. Ct. 741, 380 U.S. 102 (1965)." 1968 U.S. Code Cong. Adm. News 2190.

The Manual for Conduct of Electronic Surveillance Under Title III prepared by the Justice Department for the use of its attorneys states at page 18 that "interception under Title III is to be considered an investigative tool of last resort." *U.S. v. King,* 335 F. Supp. 523 (S.D. Calif. 1971).

In *United States v. Leta,* 332 F. Supp. 1357 (M.D. Pa. 1971), the Court found need for wiretap justified by specific averments conforming to the strict requirements of law where it was stated as follows:

"1. Confidential informants described categorically refused to testify in open court.

"2. Without the testimony of the above-mentioned informants, it would be impossible to prove the interstate nature of the current gambling operation of Anthony Leta.

"3. The location of Leta's two headquarters make execution of a search warrant a dubious enterprise, it being virtually impossible to approach either location without being observed by persons used as lookouts.

"4. There are no known witnesses who could be relied upon to testify truthfully to the violations in question.

"5. Due to the manner in which the violations are carried out, the interception of these communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove these violations."

In the instant case, there are no averments as to confidential informant's refusing to testify; difficulty in execution of search warrants or lack of known witnesses. The need to wiretap was not established as required by Title III. See *United States v. Sklaroff*, 323 F. Supp. 296 (S.D. Fla. 1971) and *United States v. Perillo*, 333 F. Supp. 914, 921 (D. Del. 1971), where the Court states:

> "Even if all these conditions were met, however, the issuing magistrate cannot authorize a wiretap unless he also finds that normal investigative procedures have either failed, previously, appear unlikely to work subsequently, or seem too dangerous to attempt. *This extra protection of privacy, above and beyond that required by the Fourth Amendment, manifests the intention of the framers of the*

statute to ensure that each wiretap would be not only reasonable, but also necessary. These statutory sections cited show that applications for wiretaps must be narrow in scope and limited to objects to be seized before an order authorizing the interceptions of a wire communication will issue." (Emphasis ours).

Perillo, supra, expresses the concern of Senator McClellan found in his report to President Nixon as reported in Vol. 115, *Cong. Record No.* 136, page 3.

It is submitted that Senator McClellan's fears were realized in the "Fox Tap" since these were used as a shortcut or substitute for other investigative techniques and not after exhaustion of such techniques. There was no need.

Unquestionably, the exhaustion requirement was not made a part of the statutory framework to foreclose the use of electronic surveillance until law enforcement officials had exhausted every possible means of obtaining evidence against potential defendants, but it was inserted to permit the authorizing judge to be fully conversant with the nature and progress of the investigation and the difficulties, if any, in the use of normal investigatory techniques. 1968 U.S. Code C and A News, 2190; *United States v. King,* 335 F. Supp. 523 (S.D. Calif. 1971).

The trial court by order entered *nunc pro tunc* May 24, 1972 (App. 7-13) denied Petitioner's Motion to Suppress and the Appellate Court affirmed the action of the trial court although it should have suppressed the communications and evidence derived therefrom since the statute, even if constitutional, must be strictly and narrowly construed. *Application of United States,* 427 F.2d 639 (9th Cir. 1970).

III.

The holding that tape recordings made of interviews with a Government witness by an agent of the Federal Bureau of Investigation are not within the ambit and scope of Title 18, U.S.C. § 3500 and producible to the Defendants at trial after the witness in question testifies not only is in conflict with other appellate decisions and decisions of this Court, but is also, in effect, an invitation to this Court to decide an important question of Federal law.

As a result of pre-trial proceedings in this cause, the Court directed that all "Jencks Act Statements" be produced in advance of trial. The Government substantially complied with this order except for statements of Beverly Mathews which were not produced until such time as she took the witness stand to testify. During the course of Mrs. Mathews' testimony, a question relating to the suppression of wire intercepts was considered by the Court, during the course of which Petitioners learned for the first time that Mrs. Mathews had been interviewed by FBI agents on two or three occasions, which interviews were mechanically recorded on tape. (App. 111, 112). These tape interviews were erased pursuant to the directions of the Assistant U.S. Attorney conducting the investigation and the ultimate prosecution of this case, Bernard H. Dempsey, although the interviews came at a point in time when Mrs. Mathews, an FBI informant, had already agreed to act as a Government's witness (App. p. 112), and after Petitioners herein had been indicted. The tapes in question have never been transcribed. (App. p. 112).

Title 18, U.S.C. § 3500, in part, provides as follows:
"... (e) The term 'statement' as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

". . .

"(2) a stenographic, mechanical, electrical, or other recording or a transcription thereof which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; . . ."

The prosecutor advised the FBI agent conducting the interviews to tape Mrs. Mathews ". . . because of the fact that Mrs. Roberts (Mathews) was speaking so rapidly and providing so much information, and he was having difficulty in getting everything that was meaningful down, and he was somewhat frustrated, and the best way to go about getting everything she had to say down was to use a tape recorder."

It must be noted that the reports of the tape interviews with Mrs. Mathews that were provided to counsel pursuant to motion at the conclusion of her testimony did not reflect in anyway that said notes and reports either came from an interview that was taped or in any way related to the taped interviews. (App. 112, 113).

The FBI report of the taped interviews did not purport to quote Mrs. Mathews, nor did they purport to relate her language or the terms she used, but simply in summary fashion and form attempted to present the agents general recollection of the substance of the interview.

All trial counsel know that it is one thing to attempt to impeach a critical witness with third party records (FBI reports that do not purport to quote a witness) versus a signed statement or tape recording of the witness where the precise language and terminology of the witness is contained. The distinction be-

tween that which was made available for use in cross-examination and that which existed until such time as the prosecutor directed the destruction of the tape recordings should be obvious and that type of distinction was noted by the Court in *Augenblick v. United States,* 377 F.2d 586, 601 (U.S. Ct. of Cl. 1967).

There is authority that would support the good faith destruction of statements of witnesses. Those cases generally deal with the normal administrative practice, the typical situation being an FBI agent taking personal notes during the course of an interview and then using those notes as a predicate for dictating his report, the substance of the notes being embodied in his report, and as a consequence the destruction of said original notes would be and has been deemed to be a good faith destruction and not violative of the provisions of the "Jencks Act." *Alexander v. U.S.,* 336 F.2d 910 (U.S.D.C. 1964); *U.S. v. Jones,* 360 F.2d 92 (C.A.N.Y. 1966). The significant consideration that the trial court and the appellate court failed to take into consideration in determining the propriety of the actions of the prosecutor herein are as follows:

> (1) Had the defendants been arrested and/or charged at the time of the taped interviews? Yes. The arrest of most of the defendants occurred on or about October 27, 1971, and the Indictment was returned on November 1, 1971. (App. p. 106)
>
> (2) Had a decision been made to use the party interviewed as a witness against the Defendants? Yes. The transcript reflects the following: 'That was after you knew that she had already agreed to be a witness in this case, and the subject matter of those tapes related to some aspect of what she testified to here; is that right? A. That's right.' (App. p. 112).

(3) Were the reports made available to counsel for petitioners a verbatim or substantially verbatim transcript of the taped interviews? No. The transcript of the proceedings shows the following: "Do you know whether or not those tapes were produced in typed form or otherwise verbatim? A. I know they were not. You asked if there was a transcript of the tapes. There is none. There are no taped verbatim statements." (App. p. 112). Each of the taped interviews lasted from two to three hours (App. p. 113) and all that the agent did to prepare his report of those interviews was to listen to the tapes and correlate those with the notes that he had made during the course of the interviews and then dictate his report to a stenographer.

(4) Did the destruction of the tapes come about as a result of participation and directions from persons actively participating in the investigation and prosecution of these matters? Yes. Bernard Dempsey, the Assistant United States Attorney, directed that the tapes be made and then erased and that procedure was followed by FBI agent, Philip Smith. (App. p. 111, 112).

Although good faith destruction of "Jencks Act Statements" has been approved, there is no authority that would permit the nature and type of conduct perpetrated against Petitioners in this case. As a matter of fact, the authorities in that regard consistently dictate that sanctions are to be imposed upon the prosecution for its failure to produce "Jencks Act Statements," the burden being on the Government to establish the propriety of its conduct. *United States v. Lonardo,* 350 F.2d 523 (6th Cir. 1965); *Campbell v. United States,* 365 U.S. 85 (1961); *Killian v. United States,* 368 U.S. 231 (1961).

The *Court of Appeals* dealing with this issue stated at page 920. as follows:

". . . Similarly, the tape recordings made in this case were clearly not within the scope of the Jencks Act."

The aforesaid pronouncement by the Fifth Circuit Court of Appeals is clearly wrong, and the failure of the trial court to strike the testimony of Mrs. Mathews in light of the acts of the prosecuting officials in this case depriving Petitioners of the benefit of her taped statements and the sanctioning of that conduct by the appellate court requires this Court to, once and for all, lay the question to rest.

CONCLUSION

The decision below departs radically from both substantive and procedural judicial precedent. The matters involved are of extreme general and national significance. The questions presented have not been, but should properly be, conclusively determined by this Court. The holdings below cannot be reconciled with those of this Court, other Courts of Appeals and District Courts.

The maintenance of uniformity in the administration of criminal justice in the Federal Courts is jeopardized by the decision below. For all of the reasons listed above, it is most strenuously urged that this Court exercise its discretion and grant the Writ.

/s/ Arnold D. Levine
ARNOLD D. LEVINE
725 East Kennedy Boulevard
Tampa, Florida 33602
Attorney for Petitioners

IN THE

Supreme Court of the United States

October Term, 1973

No. _____

LOUIS B. PACHECO and
JOHN N. FOUNTAIN, JR.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARNOLD D. LEVINE of
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Attorneys for Petitioner

UNITED STATES DISTRIT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NO. 71-83-Orl-Cr.

UNITED STATES OF AMERICA

v.

JOSEPH LOUIS LANZA, et al.,

Defendants.

O R D E R

On March 30, 1972, this Court entered an Order denying in part the motion of the sixty defendants in this organized crime gambling prosecution to suppress the evidence obtained through court-ordered wiretaps.[1] Subsequently, at a hearing on April 20, 1972, in Jacksonville, Florida, the parties concluded their evidence and arguments on the motion to suppress. Accordingly, this Order will dispose of the remaining issues relating to the wiretap evidence.

Initially, the defendants argue that the tape recordings of the wire intercepts are inadmissible because the government failed to furnish the tapes to the judge who entered the intercept order to be sealed pursuant to 18 U.S.C. §2518(8)(a).[2] The testimony discloses that two tape recorders were used to simultaneously record each itercepted communication. One recorder contained the "original" tape which was replaced every day with a fresh tape. At the end of the day, the "original" was immediately removed to another recorder where a "duplicate" or "copy" was made; the original was then sealed. The second recorder contained a "work-tape" which was left on the recorder and not replaced until it was full. The defendants' position is that this "work-tape" is subject to the same seal requirements as the

original tape. They argue that, whenever the original recorder malfunctioned, the work-tape would be the only one containing the recorded intercept. The evidence does show that one or both of the recorders malfunctioned at various times. Although there is no evidence of it in the record, the Court will assume, for purposes of argument, that the work-tape contains one or more evidentiary conversations not included in the original. The question to be resolved is the effect on the admissibility of the wiretap evidence as a whole. The sealing requirement of 18 U.S.C. §2518(8)(a) is susceptible of two interpretations. The absence of the seal on one portion of a wire intercept can either bar the admissibility of the entire intercept or just that portion lacking the seal. If, for example, ten tapes were made on ten days and only nine were sealed, the question posed is whether Section 2518(8)(a) would bar the admission of one or all of the tapes.

According to the record in this case, the typed transcripts of conversations and trial tapes (containing the conversations the government planned to introduce in evidence) were made from the duplicate tapes, which were copied from the originals. There is no showing that anyone ever listened to or transcribed the work tapes or that any evidence was sought to be introduced at trial which was not on the original tapes under judicial seal. Under these circumstances, it cannot be said that any of the unsealed evidence prejudiced the defendants in any way. It is unnecessary to decide whether sealed conversations must be excluded from evidence when it is shown that unsealed conversations, pertinent or supplemental thereto, were recorded on work tapes while the original recorder was inoperative.

Next, the defendants contend that the Florida Department of Law Enforcement failed to conduct the wiretap pursuant to 18 U.S.C. §2518(5)[3] so as to minimize the interception of communications not subject to lawful interception, that is, conversations either nonpertinent to the investigation or privileged. Defendants rely on *United States v. Scott*, 331 F.Supp. 233 (D.D.C. 1971), for the proposition that the interception of non-

pertinent calls requires the suppression of all intercepted communications. In *Scott*, virtually all calls were monitored and recorded and 60% of the calls were later determined to be non-pertinent. The Court's holding, however, was not that 60% was too many non-pertinent calls to satisfy the statute, but that the failure of the agents to make any attempt whatever to minimize the interception of he calls did not meet the statutory requirements.

The statute does not prohibit the interception of non-pertinent calls; rather it requires the agents to conduct the wiretap so as to minimize such interception. When, as in *Scott*, this mandate is so blatently ignored, the proper result is the suppression of the entire intercept. On the other hand, where non-pertinent calls are intercepted despite the agents' effort at minimization, only the unauthorized interceptions should be suppressed. *United States v. LaGorga*, 336 F.Supp. 190 (W.D. Pa. 1971); *United States v. King*, 335 F.Supp. 523 (S.D. Cal. 1971); *United States v. Perillo*, 333 F.Supp. 914 (D. Del. 1971); *United States v. Leta*, 332 F.Supp. 1357 (M. D.Pa. 1971).

In the case at bar, the agents intercepted 4,098 phone calls during the course of the six wiretaps. Of this number the government represents that 1,265 or 31% of the calls were of an evidentiary nature and 1,066 calls or 26% were recorded non-pertinent calls. 944 or 23% of the total calls were terminated non-pertinent calls, that is, the agents terminated the recording after hearing enough of the conversation to determine that the subject matter was in fact non-pertinent. Finally, there were 823 calls, or 20% of the total, which resulted in busy signals, no answers, wrong numbers, and the like.

The evidence in this record establishes that the agents were instructed to make a determination as to the subject matter of each call and to terminate privileged or non-pertinent communications. This is precisely what occurred on 944 calls. There are also instances on the tapes of clearly evidentiary conversations being

terminated when the discussion turned from gambling to unrelated and non-pertinent matters. This is further evidence of the agents' awareness of and attentivenss to the requirement of minimization. Of the recorded non-pertinent conversations, a substantial portion of those were conversations which were too short to allow the agent to make a determination as to content or subject matter.

The Court has listened to all of the tapes and examined the transcripts and monitoring logs and is fully satisfied that the agents made every reasonable effort to conduct the intercept so as to minimize the interception of non-pertinent and privileged conversations. In this respect, the requirements of the law were fully satisfied.

Another ground cited by defendants in support of their motion to suppress is that the State failed to make the requisite showing that other investigative techniques had been tried and failed or were unlikely to succeed.[4] The defendants argue, for example, that the State already had sufficient evidence to successfully prosecute the individuals aganst whom wiretap orders were sought and that the only reason for the taps was to gather information about unknown conspirators. In short, the defendant's position is that you can't monitor Mr. X's telephone to obtain evidence against a third party if you already have a case against Mr. X. It would be inconsistent, indeed, to require the State to aver in its application for a wiretap order on Mr. X's phone that normal techniques have failed if the only proper subject of wire investigation was Mr. X against whom the State could establish probable cause for arrest.

The State in this case had sufficient information about the initial wiretap subjects to realize that a large scale lottery operation was being conducted, which, by its very nature, necessarily involved a hierachal conspiracy. The defendants point to no evidence that was available to the State through normal investigative techniques to pierce the veil of the conspiracy. The tapes themselves clearly show that the bulk of the thans-

actions within the conspiracy were carried out by telephone. In many instances, conduct which was susceptible of ordinary surveillance was so isolated as to be discoverable only through the use of electronic surveillance.

The purpose of the exhaustion requirement is not to compel the State to employ every *possible* conventional technique, but merely to inform the authorizing judge of the difficulties encountered, and the lack of success, in using conventional investigatory methods. 1968 *U.S. Code Cong. & Admin. News* 2190; *United States v. King,* 335 F.Supp. 523 (S.D.Cal. 1971).

The defendants have also argued that the State failed to terminate the interceptions upon he attainment of the authorized objective.[5] Again, it is not reasonable to conclude that the only proper objective of the investigation was the arrest of a few known individuals selling lottery tickets.

Finally, the defendants complain that background conversations or voices of third persons, not party to phone conversations being tapped, were overheard and intercepted. That such interceptions may occur does not render the wiretap unconstitutional or the evidence inadmissible, *United States v. Leta,* 332 F.Supp. 1357 (M.D.Pa. 1971), and there are no facts in the record which would lead the Court to conclude that the entire interception was unreasonable.

Having considered all the arguments and memoranda submitted by the parties, the Court concludes that the wire interceptions in this case were conducted fully within the spirit and the letter of he law. It is, therefore

ORDERED that the defendants' motion to suppress the wiretap evidence in this case is hereby denied.

DONE AND ORDERED this 10th day of October, 1972.

/s/ Gerald B. Tjoflat

UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] United States v. Lanza, 341 F.Supp. 405 (M.D.Fla. 1972).

[2] 18 U.S.C. §2518

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

[3] 18 U.S.C. §2518(5) provides in part that:

Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.

[4] 18 U.S.C. §2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that —

* * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

---

s 18 U.S.C. §2518(5) provides in part that:

No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days.

* * *

Every order and extention thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable . . . and must terminate upon attainment of the authorized objective, or in any event in thirty days.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NO. 71-83-Cr-Orl.

UNITED STATES OF AMERICA

v.

JOSEPH LOUIS LANZA, et al.

ORDER

During the course of the trial of this case, the government called as one of its principal witnesses, Beverly Roberts Matthews. She testified at great length and in great detail concerning the Harlan Blackburn gambling operation, the subject of this prosecution. One of the things developed during her cross-examination was that she had gone to the Federal Bureau of Investigation and offered her services as an informant at a time when the Florida Department of Law Enforcement (F.D.L.E.) was conducting court-ordered wiretaps in the investigation of the case. In consequence of this disclosure, counsel for defendant John Newton Fountain renewed his motion to suppress all the wiretap evidence[1] in the case on the ground that there had been no need for the wiretap surveillance pursuant to 18 U.S.C. §2518. That section requires that "normal investigative procedures have been tried and have failed" before a wiretap warrant can issue.[2]

Out of the presence of the jury, the Court conducted a hearing on the availability of Mrs. Matthews as a witness at the time of the wiretap applications, especially the application to monitor the Fox telephones, the last intercept made. The Court heard Mrs. Matthews; the prosecutor, Assistant Unied States Atorney Bernard Dempsey; and Special Agent Phillip Smith of the F.B.I. Their testimony revealed that Mrs. Matthews had been

convicted of perjury in Orlando, Florida, in February, 1971. The perjury occurred in a grand jury investigation of the organized gambling activities involved here. In July, 1971, after the conclusion of the perjury prosecution, she went to Special Agent Smith in an effort to clear her conscience. Mrs. Matthews had been Harlan Blackburn's personal secretary and confidant and had witnessed or participated in much of the high level functioning of his organization for several years. Agent Smith subsequently advised Prosecutor Dempsey that she was divulging information about the Blackburn operation.

The monitoring in this case began on May 12, 1971, and continued through October, 1971, when the last tap was terminated and the arrests of the defendants were made. During the course of the monitoring, the F.B.I. and the United States Attorney's Office were aware that the F.D.L.E. was conducting an intensive investigation into organized gambling in the central Florida area. In fact, an F.B.I. informant had furnished part of the information leading to the issuance of one of the wiretap warrants. However, the F.D.L.E. made no progress reports to the F.B.I. or any other federal agency; and those agencies were neither aware of nor participated in any facet of the investigation until September, 1971. In that month the F.D.L.E. approached Dempsey to inquire whether the United States could undertake the prosecution of the case then under F.D.L.E. investigation. At this time Beverly Roberts Matthews was not a potential witness. For, had it been known to those involved in the organized criminal activity that she had been "talking" to the F.B.I., her life would have been seriously endangered. Even without disclosing her identity as an informant, it was eventually necessary for the government to place her in the protective custody of the United States Marshal. Her situation was so sensitive that it would have been unconscionable for Agent Smith or Prosecutor Dempsey to have disclosed her name and the information she was giving to the F.D.L.E. or anyone else during the pendency of the monitoring in question.

It was not until after the wiretaps were concluded and the United States Attorney's Office had assumed jurisdiction of this case that the possibility of testifying was even mentioned to Mrs. Matthews; and the decision to call her as a witness was not made until late in the preparation for trial. In fact, it was not until the very eve of trial that the F.D.L.E. learned she was to testify. To suggest that she was a viable prosecution witness for the F.D.L.E. in September and October, 1971, when the last wiretap application to Florida Supreme Court Justice James C. Adkins was made, is unrealistic.

The defendants contend that the Court should impute to the F.D.L.E. whatever knowledge the F.B.I. might have obtained from Mrs. Matthews or, conversely, find that the F.B.I. had a duty to disclose to the F.D.L.E. any information it may have had in its files concerning the Blackburn organization. Thus, F.D.L.E.'s failure to advise Justice Adkins of her availability as a witness and the information she had given vitiates the efficacy of the warrant. As a blanket proposition, such a rationale would not only be unwieldy, but undesirable. Under the circumstances in this case, the Court cannot adopt such a rule. Even supposing that an informant is actually available to an investigating agency and willing to testify, there still may be a valid need for wiretap evidence.[3] *United States v. Leta,* 332 F.Supp. 1357 (M.D. Pa. 1971). The purpose of the exhaustion requirement is not to foreclose the use of electronic surveillance until the state has exhausted every possible means of obtaining a viable case against the subjects, but merely to inform the authorzing magistrate or judge of the nature and progress of the investigation and the difficulties inherent in the use of normal techniques. 1968 *U.S. Code Congressional & Administrative News* 2190; *United States v. King,* 335 F.Supp. 523 (S.D. Cal. 1971). The difficulties inherent in this case are obvious from the sheer magnitude of the organization involved. Sixty defendants, with widely varying roles in the organization, were originally indicted.[4] The defendants do not contend that the informants who supplied information

of isolated instances of wagering knew everything about the overall operation of the business or that anyone can be pointed to who was familiar with or even knew every defendant. In fact, Mrs. Matthews, who obviously knew a great deal about the business, was acquainted with only one of the four defendants on trial. As to many of the defendants, the only incriminating evidence was that obtained from the wiretaps.

Under these circumstances, the Court concludes that Mrs. Matthews' cooperation with the F.B.I. was not attributable to the F.D.L.E. and in no way impairs the legal sufficiency of the applications and interception orders in this case. It is, therefore

ORDERED that the defendants' motion to suppress the evience in this case is denied.

DONE and ORDERED *nunc pro tunc* May 24, 1972.

UNITED STATES DISTRICT JUDGE

/s/ Gerald B. Tjoflat

Copies: Counsel of Record

FOOTNOTES

[1] The Court previously denied the defendant's motion to suppress wiretap evidence on multiple grounds. United States v. Lanza, ——— F.Supp. ——— (No. 71-83-Orl.-Crim. M.D. Fla. October 1, 1972); United States v. Lanza, *341 F.Supp. 405* (M.D. Fla. 1972).

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[2] 18 U.S.C. §2518 — Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that —

* * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * *

---

[3] The defendants have already raised this objection with respect to other informants who provided information used to establish probable cause for the initial wiretap applications. United States v. Lanza, ——— F.Supp. ——— (No. 71-83-Orl.Crim. M.D. Fla. October 1, 1972).

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[4] Of the sixty original defendants, one died, one was dismissed, three were severed and await trial and fifty-two pleaded guilty —over forty of those on the morning of trial. Only four defendants actually went to trial, at which Mrs. Roberts testified.

A-14 INDEXED

UNITED STATES of America, Plaintiff-Appellee,

v.

Louis B. PACHECO and John N. Fountain, Jr., Defendants-Appellants.

No. 72-3355.

United States Court of Appeals, Fifth Circuit.

Feb. 8, 1974.

By judgments of the United States District Court for the Middle District of Florida, at Orlando, Gerald B. Tjoflat, J., the defendants were convicted of operation of an illegal gambling business and conspiracy to operate an illegal gambling business and they appealed. The Court of Appeals, Ainsworth, Circuit Judge, held, inter alia, that it was proper to charge defendants with both the conducting of illegal gambling operation and with conspiracy, that court did not abuse discretion in denying motion of defense for election or severance of counts, that the state wiretap orders were valid and that the federal statute was constitutional.

Affirmed.

1. Conspiracy ⇐28(2)

Commission of substantive offense and a conspiracy to commit it are separate and distinct offenses. 18 U.S.C.A. § 371.

2. Gaming ⇐62

Jurisdictional requirement of federal gambling statute that five or more persons be involved in illegal gambling business is unrelated to the criminal character of conduct and should be separately treated. 18 U.S.C.A. § 1955.

3. Gaming ⇐62

Federal statute prohibiting illegal gambling was drafted to prohibit only those gambling businesses that reach the size and scope certain to have a significant interstate impact and leaves to states the control of enforcement efforts against smaller gambling operations that do not meet minimum jurisdictional requirements though such businesses might be identical to others in every respect except size. 18 U.S.C.A. § 1955.

4. Conspiracy ⇐28(3)

Basic conduct prohibited by federal statute with respect to illegal gambling business does not require concert of action and defendants could properly be charged with both violation of federal statute relating to illegal gambling business and with conspiracy to violate such statute. 18 U.S.C.A. §§ 371, 1955.

5. Criminal Law ⇐622(1)
Indictment and Information ⇐132(3)

Existence of prejudice which justifies ordering an election of counts or separate trials depends in large measure on facts and circumstances of each case. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

6. Criminal Law ⇐622(1), 1148, 1149
Indictment and Information ⇐132(3)

Determination of existence of prejudice justifying ordering an election of counts or separate trials is within discretion of trial judge whose ruling will rarely be disturbed on review.

7. Criminal Law ⇐618

Granting of severance of counts is within discretion of trial judge.

8. Criminal Law ⇐1163(1), 1166(1)

Burden of demonstrating prejudice for refusal to grant severance of counts is a difficult one and defendant must show something more than the mere fact that separate trial might offer him a better chance of acquittal.

9. Criminal Law ⇐618
Indictment and Information ⇐132(3)

Trial judge did not abuse discretion in denying motion of defendants, charged with operation of illegal gambling business and with conspiracy to operate an illegal gambling business, for severance of counts or an election of counts. 18 U.S.C.A. §§ 2, 371, 1955; Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

10. Telecommunications ⇐496

Purpose of including in federal wiretapping statute requirement that principal prosecuting attorney of any state or of any political subdivision thereof apply to state court judge for order is not to designate particular officer by name or title but to ensure centralization of policy decisions of this type at the highest practicable levels, preferably on a statewide basis. 18 U.S.C.A. § 2516(2).

11. Telecommunications ⇐496

Florida court wiretap orders, procured on application of Florida governor under Florida statute authorizing interception of wire communication on application of governor, department of legal affairs, or the state attorney or county solicitor, were not invalid under federal statute permitting principal state prosecuting attorney to make application for wiretap order. 18 U.S.C.A. § 2516(2); F.S.A. § 934.07.

12. Telecommunications ⇐496

Since Florida Constitution empowers chief justice to assign justices and judges of state courts to judicial service in any other state court of the same or lesser jurisdiction, the Constitution, not the particular designation of assignments by chief justice, confers general criminal jurisdiction on justices of the Supreme Court, and wiretap order authorized by justice of the Supreme Court was valid, despite claim that Florida Supreme Court had no general criminal jurisdiction. 18 U.S.C.A. § 2510(9)(b); F.S.A. § 934.02(8); F.S.A.Const. art. 5, § 2.

13. Telecommunications ⇐496

Congress in enacting federal statute relating to which state court judges are authorized to issue wiretap orders did not intend to specify particular state courts that could issue orders but rather described quality of public official who should pass upon such matters. 18 U.S.C.A. § 2510(9)(b).

14. Telecommunications ⇐496

Where applications by governor and wiretap orders issued by justice of Florida Supreme Court recited that the proposed wire intercepts might provide evidence of violation of Florida statute making it unlawful to conduct lottery, orders were not invalid on ground that lottery was not gambling within meaning of Florida wiretap statute, since "gambling" is used in its generic sense and comprehends any otherwise qualifying activity including conducting a lottery. 18 U.S.C.A. § 2516(2); F.S.A. §§ 849.08, 849.14, 934.07.

15. Telecommunications ⇐496

Additional offenses discovered during course of a proper wiretap may be prosecuted regardless of nature of offense or prescribed punishment, notwithstanding federal statute permitting states to use wiretap only if interception may provide evidence of one of the enumerated offenses and the offense is punishable by imprisonment for more than one year. 18 U.S.C.A. § 2516(2).

16. Telecommunications ⇐496

Where identity of principal witness was known to United States only at time Florida officials applied for and procured wiretap order, such order was not invalid on ground that prosecutor intentionally suppressed information about such witness in application for wire interception and such a disclosure would have shown that normal investigative techniques were sufficient to develop case. 18 U.S.C.A. § 2518(1)(c).

17. Telecommunications ⇐496

Purpose of requirement of federal statute that an application for state court intercept order include a full and complete statement as to whether or not other investigative procedures

had been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous, is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted but simply to inform issuing judge of the difficulties involved in use of conventional techniques. 18 U.S.C.A. § 2518(1)(c).

18. Commerce ⇐55

Federal statute prohibiting the illegal gambling business as defined therein as including five or more persons who conduct, finance, etc., all or part of such business and which has been in continuous operation for more than 30 days or has gross revenue of $2,000 in any single day is a valid and constitutional exercise of congressional power over interstate commerce. 18 U.S.C.A. § 1955.

19. Criminal Law ⇐627.5(5)

Failure of prosecutor to retain original tapes of conversations recorded with government witness and from which government agent later made notes which he used together with the tapes to dictate notes later transcribed on interview reports ultimately furnished to defense counsel did not constitute a violation of Jencks Act which does not require that notes made in course of investigation be preserved after notes have served purpose of assisting in preparation of interview reports. 18 U.S.C.A. § 3500.

20. Criminal Law ⇐627.6(5)

Standard FBI interview reports did not become statements subject to production under Jencks Act until government witness had examined their content and confirmed that they were accurate. 18 U.S.C.A. § 3500.

21. Criminal Law ⇐388

Under circumstances presented, trial court did not err in refusing to admit, in prosecution of defendant for operation of illegal gambling business and for conspiracy, the results of polygraph test taken by one of the defendants. 18 U.S.C.A. § 1955.

Appeals from the United States District Court for the Middle District of Florida.

Before GEWIN, AINSWORTH and MORGAN, Circuit Judges.

AINSWORTH, Circuit Judge:

Appellants Louis B. Pacheco and John N. Fountain, Jr., were indicted, along with fifty-eight other persons, in a two-count indictment charging them with operation of an illegal gambling business, in violation of 18 U.S.C. §§ 1955 [1] and 2,[2]

1. 18 U.S.C. § 1955 provides in relevant part:
§ 1955. Prohibition of illegal gambling businesses
(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
(b) As used in this section—
(1) "illegal gambling business" means a gambling business which—
(i) is a violation of the law of a State or political subdivision in which it is conducted;
(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.
(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.
(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

. . . . . .

2. 18 U.S.C. § 2 provides:
§ 2. Principals
(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

and with conspiracy to operate an illegal gambling business, in violation of 18 U.S.C. § 371.[3] All those indicted were allegedly participants in the same illegal gambling organization involving bookmaking and numbers operations in Florida. By the date set for trial, fifty-two of the defendants entered pleas of guilty to one or both counts, and only four defendants were left for trial.[4] After a two-week jury trial, verdicts of guilty on both counts were returned as to three of the defendants, including appellants here. The fourth defendant was found guilty on count II but was acquitted on the conspiracy charge contained in count I. Appellant Pacheco was placed on a three-year probation, and appellant Fountain was sentenced to six months in jail plus a five-year probation. Appellants do not contest the sufficiency of the evidence presented at trial to support their convictions; rather, they raise several issues concerning the trial court's rulings on certain motions and on particular matters of evidence. After careful consideration of their assertions of error, we affirm appellants' convictions.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

3. 18 U.S.C. § 371 provides:

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

4. One defendant had died, the case as to another had been dismissed, and the case as to the remaining two had been severed for trial at a later date.

I

For federal jurisdiction to exist over the operation of an illegal gambling business, in violation of 18 U.S.C. § 1955, it is necessary to show, *inter alia*, that the business "involve[d] five or more persons" in its conduct, financing, management, supervision, direction, or ownership. 18 U.S.C. § 1955(b)(1)(ii). Because of this jurisdictional requirement, appellants, relying on Wharton's rule, *see* page 905, *infra*, contend that it was improper to charge them with both the substantive offense of operating an illegal gambling business and a conspiracy to commit that offense; and that the trial court, therefore, erred in denying their motions to dismiss count I of the indictment, which charged a violation of 18 U.S.C. § 371. While Wharton's rule, properly applied, may occupy a legitimate place in the criminal law,[5] it would be inappropriate to apply it in the present situation.

[1] It is fundamental that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses", Callanan v. United States, 364 U.S. 587, 593, 81 S.Ct. 321, 325, 5 L.Ed.2d 312 (1961); Pinkerton v. United States, 328 U.S. 640, 643, 66 S.Ct. 1180, 1182, 90 L.Ed. 1489 (1946), and a person may ordinarily be convicted of and sentenced for both. Pinkerton v. United States, 328 U.S. at 643, 66 S.Ct. at 1182. Conspiracy is a separate offense on the theory that collective criminal agreement presents greater antisocial potentialities than criminal activity pursued by individuals. *See, e. g.*, W. LaFave & A. Scott, Jr., Criminal Law 459–60 (1972); Developments in the Law—Criminal Conspiracy, 72 Harv.L.Rev. 920, 923–24 (1959). "Concerted action both increases the likelihood that the criminal object will be

5. *But see* Model Penal Code § 5.04, Comment, at 173 (Tent. Draft No. 10, 1960):
The rule is supportable only insofar as it avoids cumulative punishment for conspiracy and the completed substantive crime, for it is clear that the legislature would have taken the factor of concert into account in grading a crime which inevitably requires concert.

successfully attained and decreases the probability that the individuals involved will depart from their path of criminality." Callanan v. United States, 364 U.S. at 593, 81 S.Ct. at 325.

Wharton's rule affords a narrowly limited exception to the principle that conspiracy, as well as the substantive offense, may be prosecuted. That rule, as stated by the commentator whose name it bears, provides that "when to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a nature that it is aggravated by a plurality of agents, cannot be maintained." 2 F. Wharton, Criminal Law § 1604, at 1862 (12th ed. 1932). The classic situations in which the rule is said to apply are dueling, bigamy, adultery, and incest. *Id.* The apparent rationale of the rule is that it is grossly unjust to punish two parties for the commission of a crime and for combining to commit the crime when the combination is an inherent element of the substantive offense. *See* R. Anderson, 1 Wharton's Criminal Law and Procedure § 89 (1957); Developments in the Law—Criminal Conspiracy, *supra*, at 953–56. In the case law, the rule has been applied almost exclusively to instances in which the object of the alleged conspiracy was a two-party crime, such as the giving and receiving of bribes, United States v. Dietrich, 126 F. 664 (C.C.D.Neb.1904); People v. Wettengel, 98 Colo. 193, 58 P.2d 279 (1935), or the buying and selling of contraband goods, United States v. Katz, 271 U.S. 354, 355, 46 S.Ct. 513, 70 L.Ed. 986 (1926) (dictum). The rule has been held not to apply when the number of conspirators exceeds the number of participants essential to the contemplated crime. *See, e. g.*, United States v. Iannelli, 3 Cir., 1973, 477 F.2d 999, 1002 (18 U.S.C. § 1955); United States v. Becker, 2 Cir., 1972, 461 F.2d 230, 234 (18 U.S.C. § 1955); Baker v. United States, 9 Cir., 1968, 393 F.2d 604, 610, cert. denied, 393 U.S. 836, 89 S.Ct. 110, 21 L.Ed.2d 106; Old Monastery Co. v. United States, 4 Cir., 1945,

147 F.2d 905, 907–908, cert. denied, 326 U.S. 734, 66 S.Ct. 44, 90 L.Ed. 437.[6]

[2] In asking us to apply Wharton's rule to the section 1955 situation, appellants misconceive the import of that section's jurisdictional requirement that five or more persons be involved in the illegal gambling business. Such jurisdictional requirements are unrelated to the criminal character of the conduct and should be separately treated. *See, e. g.,* United States v. Blassingame, 2 Cir., 1970, 427 F.2d 329, 330, cert. denied, 402 U.S. 945, 91 S.Ct. 1629, 29 L.Ed.2d 114 (1971); Overton v. United States, 5 Cir., 1968, 405 F.2d 168, 169; Pipes v. United States, 5 Cir., 1968, 399 F.2d 471, 472, cert. denied, 394 U.S. 934, 89 S.Ct. 1207, 22 L.Ed.2d 464 (1969); Pilgrim v. United States, 5 Cir., 1959, 266 F.2d 486, 488.

[3] In enacting the Organized Crime Control Act of 1970, of which section 1955 is a part, Congress directed its attention to large-scale, syndicated gambling because it was thought that "organized crime derives a major portion of its power through money obtained from such illegal endeavors as [inter alia] syndicated gambling . . .." 1970 U.S.Code Cong. & Admin.News p. 1073. As its jurisdictional basis for making organized gambling prosecutable in a federal court, Congress relied on its power to regulate interstate commerce. Section 1955 was drafted to prohibit only those gambling businesses that reach a size and scope certain to have significant interstate impact. *See* United States v. Harris, 5 Cir., 1972, 460 F.2d 1041, cert. denied, 409 U.S. 877, 93 S.Ct. 128, 34 L.Ed.2d 130. The section contains a jurisdictional statement—sepa-

6. *See generally* United States v. Bobo, 4 Cir., 1973, 477 F.2d 974, 985–986:
The cases decided on the issue of what constitutes an unindictable conspiracy reveal that Wharton's rule, rather than being a rule, is a concept, the confines of which have been delineated in widely diverse fashion by the courts. Practically the only point of agreement among the cases which have considered the issues is the validity of the rule as applied to the crimes listed by Wharton in enunciating the rule. Those were: dueling, bigamy, incest and adultery.

rate from the statement of prohibited conduct—that defines "illegal gambling business" as a business that involves five or more persons and that either is in continuous operation for more than thirty days or has a gross revenue of $2,000 in any single day. 18 U.S.C. § 1955(b)(1). Through this jurisdictional statement, Congress sought to confine federal attention to large-scale organized gambling, which clearly has direct effects on interstate commerce. It is apparent, therefore, that participation by a group of persons was included as a jurisdictional element in section 1955 for reasons wholly separate from those that explain the presence of concerted activity as a substantive element in the traditional Wharton's rule crimes.

Section 1955 left the states with control of enforcement efforts against smaller gambling operations that did not meet the minimum jurisdictional requirements, though such businesses might be identical to the others in every respect except size: "The intent of section 1511 and section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions."[7] Thus, in its section 1955 jurisdictional statement, Congress was making no distinctions between the conduct prohibited by section 1955 and that conduct not within its scope. The activity proscribed by section 1955 is not a unique offense distinguishable in its substantive elements from the crime of operating an illegal gambling business involving less than five persons—or for that matter, involving one person.

[4] Wharton's rule is applicable only when more than one party is necessary to perform the basic crime. It prevents prosecution for conspiracy only where the proscribed type of conduct cannot take place without such concert of action. The basic conduct prohibited by section 1955, however—the operation of an illegal gambling business—does not require

7. H.R.Rep. No. 91-1549, accompanying Senate Bill No. 30, which was adopted as the Organized Crime Control Act of 1970, Pub.L. 91-452, U.S.Code Cong. & Admin.News 1970, p. 4007.

concert of action. It is not, therefore, a proper subject for the application of Wharton's rule. The trial court properly denied appellants' motions to dismiss the conspiracy count of the indictment. *See* United States v. Bobo, 4 Cir., 1973, 477 F.2d 974, 985–987; Note, Wharton's Rule and Conspiracy to Operate an Illegal Gambling Business, 30 Wash. & Lee L.Rev. 613 (1973). *See also* United States v. Iannelli, 3 Cir., 1973, 477 F.2d 999, 1002; United States v. Becker, 2 Cir., 1972, 461 F.2d 230, 234.[8]

II

Appellants next contend that the trial court erred in denying their motions for severance of the conspiracy count and the substantive count or for an election of counts on which trial would proceed. Having disposed of their contention, *supra*, that the two counts charged the same offense, their further claim is not and could not be that there was a misjoinder of counts in the indictment such that relief under Rule 8 of the Federal Rules of Criminal Procedure would be appropriate.[9] Rather, appellants contend that the joint trial

8. In United States v. Hunter, 7 Cir., 1973, 478 F.2d 1019, 1026, the court held that "a charge of conspiracy to violate § 1955 may not be maintained if it comprehends nothing more than the agreement which those persons necessarily performed by the commission of the substantive offense itself." We think it clear, however, that the record before us substantiates an aggravation of criminality, not essential to the substantive offense, that resulted from the illicit agreement among the defendants.

9. Rule 8 of the Federal Rules of Criminal Procedure provides in full:
Joinder of Offenses and of Defendants
(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or

of the counts confused the jury and so prejudiced appellants that they should have been granted relief under Rule 14 of the Federal Rules of Criminal Procedure. We do not agree.

[5–8] Rule 14 provides that, *inter alia*, an election of counts may be ordered or separate trials granted if either the Government or the defendant can show that prejudice would result from a joinder of offenses or of defendants for trial.[10] The boundaries of Rule 14 were recently delineated by this Court in Tillman v. United States, 5 Cir., 1969, 406 F.2d 930, 934–935, vacated as to one defendant on other grounds, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742:

> The existence of prejudice, in large measure, depends upon the facts and circumstances of each case, Flores v. United States, 5 Cir., 1967, 379 F.2d 905, 909; Blachly v. United States, 5 Cir., 1967, 380 F.2d 665, 675; Peterson v. United States, 5 Cir., 1965, 344 F.2d 419, 422, and it is axiomatic that the granting of a severance is within the discretion of the trial judge. Smith v. United States, 5 Cir., 1967, 385 F.2d 34, 37. The burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed on review. 8 Moore, Federal Practice ¶ 14.02 [1], p. 14–3 (2d ed. 1968). The defendant must show something more than the fact that "a separate trial might offer him a better chance of acquittal." Id. at ¶ 14.04 [1], pp. 14–10—14–11, citing Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17

separately and all of the defendants need not be charged in each count.

10. Rule 14 of the Federal Rules of Criminal Procedure provides in full:

Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

L.Ed.2d 606 (1967); Robinson v. United States, 1954, 93 U.S.App.D.C. 347, 210 F.2d 29. See also Johnson v. United States, 8 Cir., 1966, 356 F.2d 680; Butler v. United States, 8 Cir., 1963, 317 F.2d 249; Smith v. United States, 1950, 86 U.S.App.D.C. 195, 180 F.2d 775. [Footnote omitted.]

See also United States v. DeSapio, 2 Cir., 1970, 435 F.2d 272, 280, cert. denied, 402 U.S. 999, 91 S.Ct. 2170, 29 L.Ed.2d 166 (1971).

[9] The showing of prejudice is, we think, particularly difficult in the situation before us, in which the counts joined charge a substantive offense and a conspiracy to commit that offense. *See, e. g.*, James v. United States, 5 Cir., 1969, 416 F.2d 467, 474, cert. denied, 397 U.S. 907, 90 S.Ct. 902, 25 L.Ed.2d 87 (1970); Milam v. United States, 5 Cir., 1963, 322 F.2d 104, 110, cert. denied, 377 U.S. 911, 84 S.Ct. 1174, 12 L.Ed.2d 181 (1964); United States v. Branan, 6 Cir., 1972, 457 F.2d 1062, 1066.[11] The relationship between the two counts is quite apparent, and the evidence required to establish the substantive offense is included, to a large extent, in the evidence necessary to establish the conspiracy count. We cannot say that the trial judge abused his discretion in denying appellants' motion for severance or election. *See, e. g.*, West v. United States, 5 Cir., 1962, 311 F.2d 69, 70; United States v. Friedman, 9 Cir., 1971, 445 F.2d 1076, 1081–1082, cert. denied, 404 U.S. 958, 92 S.Ct. 326, 30 L.Ed.2d 275; United States v. Barrow, 3 Cir., 1966, 363 F.2d 62, 67, cert. denied, 385 U.S. 1001, 87 S.Ct. 703, 17 L.Ed.2d 541 (1967); Allen v. United States, 7 Cir., 1924, 4 F.2d 688, 698–699, cert. denied, 267 U.S. 597, 45 S.Ct. 352, 69 L.Ed. 806 (1925).

11. *See also* Model Penal Code § 5.03(4), Comment, at 135 (Tent. Draft No. 10, 1960):
In the case of complex and far-flung networks of crime, such a presentation [in one trial of all aspects of the entire scheme] may be essential to an understanding of the entire operation and the role played by each participant . . . .

III

The evidence for the case against the sixty original defendants, including appellants, was developed in large measure by the Florida Department of Law Enforcement (FDLE) prior to the entry of the United States into the investigation and prosecution. The major portion of the evidence consisted of conversations intercepted by FDLE agents in a series of wiretaps of the telephones of various defendants. In each instance, the intercept was instituted pursuant to an order issued by Justice James C. Adkins of the Florida Supreme Court, upon application authorized by the Governor of Florida, Reuben Askew. The last intercept was that on the telephone of William Fox [hereinafter referred to as "Fox tap"]. It was instituted at approximately the same time the United States Attorney agreed to take over the prosecution of the case.

In the court below, appellants moved to suppress the illegal wiretaps, but no relief was granted. In this Court, appellants make five arguments against the legal validity of the interceptions. We can find, however, no infirmity in the admission in evidence of the wiretaps.

Section 2516(2) of Title 18, United States Code, permits the "principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a [state] statute," to apply "to a State court judge of competent jurisdiction" for an order permitting a wire interception.[12] No interception order can be

12. 18 U.S.C. § 2516(2) provides in full:
(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense

issued by a state court judge unless the wiretap may provide evidence of an offense specified in section 2516(2): "murder, kidnapping, gambling [inter alia] . . . . ." The corresponding section of Florida's wiretap statute is modeled after, and largely adopts the exact phrasing of, section 2516(2).[13]

Appellants' first three contentions with respect to the admission of the intercepts relate to these excerpted portions of the federal wiretap statute. Their fourth argument in this regard involves the investigative procedures attempted prior to the wiretaps; and their final contention challenges the constitutional validity of the federal statute pursuant to which the intercepts were authorized.

A

Florida has chosen to implement the requirement in the federal statute that the principal prosecuting attorney make application for the wiretap order, by designating, among

of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

13. *See* Fla.Stat. § 934.07, F.S.A.:

934.07 Authorization for interception of wire or oral communications

The governor, the department of legal affairs, or any state attorney or any county solicitor having jurisdiction to prosecute felonies in his respective jurisdictions may authorize an application to a judge of competent jurisdiction for, and such judge may grant in conformity with this chapter, an order authorizing or approving the interception of wire or oral communications by the department of law enforcement or any law enforcement agency of this state or any political subdivision thereof having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling (when the same is of an organized nature or carried on as a conspiracy in violation of the laws of this state), robbery, burglary, grand larceny, prostitution, criminal usury, abortion, bribery, extortion, dealing in narcotic drugs or other dangerous drugs, or any conspiracy to commit any violation of the laws of this state relating to the crimes specifically enumerated above.

others, the Governor of the state to authorize initial applications for interceptions. *See* Fla.Stat. § 943.07, F.S.A., reproduced at note 13 *supra*. Appellants contend, however, that the chief executive officer of the state is not within the contemplation of the federal statute authorizing the "principal prosecuting attorney" of the state to make initial approval.

[10, 11] The purpose of including this requirement in the federal statute was not to designate a particular officer by name or title but to ensure the centralization of policy decisions of this type at the highest practicable levels, preferably on a statewide basis. In the words of the Senate report explaining section 2516(2):

> In most States the principal prosecuting attorney of the State would be the attorney general. The important question, however, is not name but function. The intent of the proposed provision is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer of the State. Who that officer would be would be a question of State law. Where no such office exists, policy-making would not be possible on a statewide basis; it would have to move down to the next level of government.

Senate Report No. 1097, 1968 U.S.Code Cong. & Admin.News pp. 2112, 2187. Appellants are in the position of complaining that they received too much protection rather than too little, because it was the governor, not the attorney general or state attorney, who authorized the wiretaps involved here. We reject their argument.[14] The determination that is to be made

14. Appellants urge that United States v. Robinson, 5 Cir., 468 F.2d 189, remanded on rehearing en banc, 5th Cir., 472 F.2d 973 (1973), stands for a strict reading of section 2516(2). That case involved improper delegation, in the name of the Attorney General of the United States, to inferior Justice Department officials of the power to authorize wiretap applications. The wiretap in question was found invalid under section 2516(1), which provides that the Attorney General or any specially designated Assistant Attorney General may authorize wiretap applications.

by the state official designated in accordance with the federal statute is whether a particular proposed use of monitoring techniques is consistent with the state's overall policy in this area. In such matters of policy, the governor represents the state and is superior to all prosecuting attorneys of the state. Florida's designation of its governor to determine the propriety of applications for federal interceptions comports fully with the federal requirements and ensures the safeguards for which the statute is designed.

B

[12] Appellants next assert that the wire intercepts are invalid because Justice Adkins, who authorized them, is not a "State court judge of competent jurisdiction," as required by statute. 18 U.S.C. § 2510(9)(b) defines a "State court judge of competent jurisdiction" as "a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications." By state statute, Florida has defined "judge of competent jurisdiction" as a "justice of the supreme court, judge of a district court of appeal, circuit judge, or judge of any court of record having felony jurisdiction of the state . . . ." Fla.Stat. § 934.02(8), F.S.A.[15] Appellants suggest, however, that under the Florida Constitution, the Florida Supreme Court has no general criminal jurisdiction in criminal matters and that it can act only in an

Robinson provides no support for appellants' contention. The Court's reading of section 2516(1) is consistent with the language of that subsection because the subsection specifically names the officials concerned. In section 2516(2), on the other hand, Congress left to the state statutory schemes the task of designating appropriate officials. Furthermore, in *Robinson*, the issue was whether someone inferior to the Attorney General could perform the function of approving wiretap applications; here, the question is whether his superior may do so. Whereas in *Robinson* appellants were deprived of proper guarantees owed them, appellants before us received more protections than required by statute.

15. 18 U.S.C. § 2510(9)(b) empowers both federal district and court of appeals judges to issue wiretap orders. Appellants contend, in effect, that only state trial court judges can issue wiretap orders.

appellate capacity and only with respect to certain criminal cases. They contend that the language of the federal statute is meant to encompass only judges of circuit courts and criminal courts of record in Florida and that, therefore, a justice of the Florida Supreme Court, such as Justice Adkins, has general criminal jurisdiction only when assigned by the chief justice of the state to sit as a circuit judge.[16] There is no merit to these contentions.

The Florida Constitution empowers the chief justice to assign justices and judges of the state courts to judicial service in any other state court of the same or lesser jurisdiction. Fla.Const. art. V, § 2, F.S.A. It is clear, therefore, that the constitution, not the particular designation of assignment by the chief justice, confers general criminal jurisdiction on the justices of the supreme court.[17]

[13] We note, moreover, that with respect to section 2510(9)(b) Senate Report No. 1097 points out that the former practice of allowing United States Commissioners and city mayors to issue search warrants was "too permissive for the interception of wire or oral communications." 1968 U.S.Code Cong. & Admin.News p. 2179. In acting on its concern with guaranteeing "responsible judicial participation in the decision to use these techniques", *id.*, Congress obviously did not intend to specify the particular state courts that could issue wiretap orders; instead, it described the quality of public official who should pass upon such matters. Florida has responded most

16. During the period of the intercept orders, Justice Adkins received two assignments to sit as a judge of another court, on one occasion as a trial judge, and on the other as an appellate judge.

17. Florida Statutes § 934.07, F.S.A. authorizes interception orders for precisely the same list of offenses, and in the same order, as section 2516(2), except that five additional offenses are included in the state statute. Intercept orders for gambling offenses may be issued under the state statute only "when the same is of an organized nature or carried on as a conspiracy in violation of the laws of this state." *See* note 13 *supra*. A federal order may issue when a violation of section 1955 is indicated. *See* 18 U.S.C. § 2516(1)(c).

appropriately to the wishes of the Congress by including the justices of the Florida Supreme Court among those judicial officers authorized to issue wiretap orders.

C

As previously noted, "gambling" is one of the offenses for which an interception order can be issued by a state court judge.[18] The applications and orders issued in this case all recite that the proposed intercepts may provide evidence of the violation of Florida Statutes § 849.09, F.S.A., which makes it unlawful to conduct a lottery.[19] Appellants argue that conducting a lottery is not gambling within the meaning of the Florida wiretap statute. They insist that the only Florida statutes dealing with gambling are section 849.08, which penalizes anyone who plays "in any game at cards, keno, roulette, faro or other game of chance," and section 849.14, which punishes anyone who engages in sports wagering. We reject appellants' assertions.

[14] Chapter 849 of the Florida Statutes, F.S.A., in which sections 849.08 and 849.14 are contained, is styled "Gambling" and treats, *inter alia*, lottery, keeping of gambling houses, bookmaking, and manufacturing of gambling devices. Nowhere in the chapter is there a definition of gambling or the offense of gambling. We think it clear, therefore, that "gambling" is used in its generic sense and comprehends any otherwise qualifying activity—including conducting a lottery—described in any of the various portions of Chapter 849. *See* Creash v. State, 131 Fla. 111, 179 So. 149 (1938).

[15] Appellants make one additional argument with respect to the offenses charged in the indictment. 18 U.S.C.

18. Other than limiting the offense of gambling to instances in which it is done in an organized manner, neither the federal nor the Florida wiretap statutes define gambling.

19. Florida Statutes § 849.09, F.S.A. makes it unlawful to promote, conduct, set up, advertise, assist, attempt to operate, possess any equipment or tickets for, sell or assist in the sale of tickets for, or possess any advertising for any lottery or lottery drawing.

§ 2516(2) permits states to use wiretap investigation only if the interception may provide evidence of one of the enumerated offenses *and* the offense is punishable by imprisonment for more than one year. Appellants point out that not all the offenses charged in the indictment carry a sentence of more than one year and claim that, therefore, the interceptions are invalid. We disagree. Additional offenses discovered during the course of a proper intercept may be prosecuted regardless of the nature of the offense or the prescribed punishment.

D

[16] Section 2518(1)(c) of Title 18, United States Code, requires that each application for an intercept order include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous . . . ." Appellants contend that the trial court erred in admitting the results of the Fox tap in evidence because the prosecutor intentionally suppressed information required by section 2518(1)(c) to be included in the application for the wire interception. We, however, can find no such error.

One of the principal witnesses for the United States at the trial was Mrs. Beverly Roberts Matthews, who, for a number of years prior to 1971, had been closely associated with Harlan Alexander Blackburn, a major defendant in this case. Mrs. Matthews had previously been convicted of perjury as a result of certain testimony given in an effort to shield Blackburn in another prosecution. United States v. Roberts, 5 Cir., 1971, 455 F.2d 930. While the appeal from her perjury conviction was pending, Mrs. Matthews began supplying information about Blackburn's operation on a confidential basis to the Federal Bureau of Investigation. Appellants claim that her availability as a witness should have been disclosed in the application for the Fox tap because this would have shown that normal investigative techniques were sufficient to develop the case.

We are satisfied that there is no basis for appellants' argument that Mrs. Matthews' identity or her information should have been supplied in the FDLE's application for the Fox tap. Mrs. Matthews' identity and information were known only to the United States, which was unaware of the Fox tap application until after it had been made and approved. As the district court pointed out:

> For, had it been known to those involved in the organized criminal activity that she had been "talking" to the F.B.I., her life would have been seriously endangered. . . . Her situation was so sensitive that it would have been unconscionable for [the FBI agent] to have disclosed her name and the information she was giving to the F.D.L.E. or anyone else during the pendency of the monitoring in question. United States v. Lanza, M.D.Fla., 1973, 356 F.Supp. 27, 29.

[17] Prior to the Fox tap, moreover, there was no reason to suppose that Mrs. Matthews' information was sufficient for purposes of complete investigation of this case. In no realistic sense could it be said that Mrs. Matthews had information that would eliminate, or, in some instances, even lessen, the need for the Fox tap. Without the Fox tap, there would have been at least seven defendants who would not have appeared in the case at all, and the sole evidence as to several others would have been the uncorroborated testimony of an accomplice previously convicted of perjury. Finally, we note that the purpose of the requirement in section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques. United States v. King, S.D.Cal., 1971, 335 F.Supp. 523, 535; Senate Rep. No. 1097, 1968 U.S.Code Cong. & Admin.News pp. 2112, 2190.

E

[18] Appellants make one final challenge to the admission in evidence of all the wiretaps by claiming that section 1955 is unconstitutional and that, therefore, no interception to detect a violation of the statute could lawfully be authorized pursuant to section 2516. This Court has previously considered and rejected this argument in United States v. Harris, 5 Cir., 1972, 460 F.2d 1041, 1043–1049, cert. denied, 409 U.S. 877, 93 S.Ct. 128, 34 L.Ed.2d 130, in which the challenge to the validity of the federal wiretap statute was made directly. There we held that section 1955 is a valid and constitutional exercise of congressional power over interstate commerce. *Accord*, United States v. Becker, 2 Cir., 1972, 461 F.2d 230, 233–234; Schneider v. United States, 8 Cir., 1972, 459 F.2d 540, 541–542, cert. denied, 409 U.S. 877, 93 S.Ct. 129, 34 L.Ed.2d 131. *See also* United States v. Thaggard, 5 Cir., 1973, 477 F.2d 626, 630; United States v. Palmer, 6 Cir., 1972, 465 F.2d 697, 699, cert. denied, 409 U.S. 874, 93 S.Ct. 119, 34 L.Ed.2d 126.

IV

Mrs. Matthews furnished information to an FBI agent on a score or more occasions, and the information she supplied was recorded on the standard FBI interview report, Form FD 302. The interview reports relating to her trial testimony comprised almost 100 pages, all of which were furnished to defense counsel before Mrs. Matthews testified.

[19] Two or three of the interviews with Mrs. Matthews were so lengthy and comprehensive that the interviewer, to ensure completeness and accuracy, recorded the conversations on tape and later made notes from the original recordings. From the tapes and these original notes, he then dictated notes that were later transcribed on the interview reports ultimately furnished to defense counsel. The tapes were then erased. Appellants urge that the Government's failure to

retain the original tapes, or to prepare transcripts of them, for production to the defense at trial as Jencks Act statements constitutes a violation of the Jencks Act, 18 U.S.C. § 3500. Appellants contend that the trial court therefore erred in denying their motion to strike Mrs. Matthews' testimony. We find no substance in their claim.

[20] Nothing in the Jencks Act requires that notes made in the course of an investigation be preserved after the notes have served their purpose of assisting in the preparation of interview reports. United States v. Jones, 2 Cir., 1966, 360 F.2d 92, 95, cert. denied, 385 U.S. 1012, 87 S.Ct. 721, 17 L.Ed.2d 549 (1967); United States v. Hoffa, 6 Cir., 1965, 349 F.2d 20, 47–48, aff'd on other grounds, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); Alexander v. United States, 1964, 118 U.S.App.D.C. 406, 336 F.2d 910, cert. denied, 379 U.S. 935, 85 S.Ct. 336, 13 L.Ed.2d 346. Similarly, the tape recordings made in this case were clearly not within the scope of the Jencks Act. In fact, the Form FD 302 interview reports did not become "statements" subject to production under the Act until Mrs. Matthews examined their content and confirmed that they were accurate. *See* Campbell v. United States, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963); Palermo v. United States, 360 U.S. 343, 350–353, 79 S.Ct. 1217, 1223–1225, 3 L.Ed.2d 1287. The procedures followed in this case prior to that time assured that the reports turned over to the defense were more complete and accurate than they otherwise might have been. *See* Rosenberg v. United States, 360 U.S. 367, 370–371, 79 S.Ct. 1231, 1233–1234, 3 L.Ed.2d 1304 (1959); Killian v. United States, 368 U.S. 231, 243–244, 82 S.Ct. 302, 309, 7 L.Ed.2d 256. *See also* James v. United States, 5 Cir., 1969, 416 F.2d 467, 476, cert. denied, 397 U.S. 907, 90 S.Ct. 902, 25 L.Ed.2d 87 (1970); Posey v. United States, 5 Cir., 1969, 416 F.2d 545, 557, cert. denied, 397 U.S. 946, 90 S.Ct. 965, 25 L.Ed.2d 127 (1970).

V

Appellants urge four final claims of error by the trial court: (1) that the results of a polygraph examination taken by appellant Fountain should have been admitted in evidence; (2) that the instructions to the jury with respect to the credibility of witnesses and the essential elements of count II were confusing; that the instruction to the jury on "similar transactions" was improper in light of the date of enactment of section 1955; (3) that the trial court erred in admitting in evidence testimony of crimes committed by co-defendants that were not related in any way to the charge herein; also testimony by Mrs. Matthews with respect to acts of violence committed by certain of the defendants that were unrelated to the charges on trial; and guns and similar paraphernalia seized from defendants who were not on trial; (4) that government counsel should not have been permitted to make a "prejudicial and inflammatory closing argument."

[21] Under the circumstances presented, we cannot say that the trial court erred in refusing to admit the results of the polygraph test taken by appellant Fountain. *See, e. g.*, United States v. Francis, 5 Cir., 1973, 487 F.2d 968, 972; United States v. Chastain, 7 Cir., 1970, 435 F.2d 686, 687; United States v. Wainwright, 10 Cir., 1969, 413 F.2d 796, 802–803, cert. denied, 396 U.S. 1009, 90 S.Ct. 566, 24 L.Ed.2d 501 (1970); United States v. Tremont, 6 Cir., 1965, 351 F.2d 144, 146, cert. denied, 383 U.S. 944, 86 S.Ct. 1198, 16 L.Ed.2d 207 (1966); McCroskey v. United States, 8 Cir., 1965, 339 F.2d 895, 897. After a thorough review of the record, moreover, it is clear to us that appellants' other assorted contentions are groundless.

We have examined all of appellants' assertions and have found them to be without merit. Accordingly, the judgment below is affirmed.

UNITED STATES COURT OF APPEALS

Fifth Circuit

Office of the Clerk

March 7, 1974

Edward W. Wadsworth

Clerk

600 Camp Street

New Orleans, La. 70130

TO ALL COUNSEL OF RECORD

Re: No. 72-3355 - U.S.A. v. Pacheco and Fountain

Gentlemen:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH

Clerk

By Susan B. LeBrun

Deputy Clerk

cc: Mr. Louis B. Pacheco
Mr. Arnold Levine
Mr. Bernard H. Dempsey, Jr.
Mr. Claude H. Tison, Jr.

(Exerpts Mrs. Matthews)

A It never really was like a mistress. It was not a love affair.

Q It was not a love affair?

A No, sir.

Q Mr. Blackburn, while he was in custody of the Marshal was writing you notes, some of which the Jury has seen, some of which had been read to the Jury in which he was saying — calling you dearest and darling, and the fact he wanted to get back with you. Were you deceiving him that you still maintained a love and affection for him?

A I never told him I loved him.

Q You never told him you loved him, not since 1962?

A Never.

Q Well, did you write to him while he was in custody of the Marshals?

A Yes, I did.

Q When he wrote to you, "My Darling, B. J.," "Dearest," or "Lover," did you write back in those same tones,

A No, casual letters.

Q Casual letters?

A Yes.

Q Now, while you were writing these casual letters to him, were you acting as an informant for the FBI?

A Yes, I was.

Q Could you tell me when that started? I am interested as best you can give me the precise date.

A I don't know if I can give the precise date, but it was about 10 months ago.

Q What month of the year?

A The last of July or August. I'm not sure.—

A It was a couple of months —

Q You got convicted of that, and your case was appealed, right?

A Yes, sir.

Q Now, during the process of the appeal, did you start to become an FBI informant?

A Yes, I did.

Q Had your appeal already been denied?

A No.

Q Or did it come after the denial?

A No, sir. We hadn't appealed it at that time. I hadn't appealed it.

Q So you are telling me after your conviction, and before you even appealed your case, filed an appeal, there had been an appeal process, you became an FBI informant?

A Yes, sir.

Q Did you approach the FBI or did they approach you?

A I called Mr. Smith.

Q You called Mr. Smith, where, at the FBI office?

A Yes, I did, and told him I would like to talk to him.

Q Now, had Mr. Smith and Mr. Dempsey been to interview you before the occasion that you made that telephone call?

A Many times, and before my perjury trial.

Q I am talking about after your trial and before you became an informant, did they interview you with a view in mind of trying to get some information from you, two of them, Mr. Dempsey and Mr. Smith?

A Not after my perjury trial. This was before.

Q Let me see if I can get that clear. When did you go to trial on your perjury case?

A I think I went in February. I think it was February —

Q Of what year?

A 1971 — maybe February 15th or 17th.

Q Your recollection is that after that occasion, after February of 1971, neither Mr. Dempsey nor Mr. Smith attempted to interview until you called Mr. Smith?

A I don't believe they did, sir.

Q Could you tell us when it was or what particular incident occurred so we can relate it to a point in time that you made this telephone call?

A It was after I was sentenced, but I am not sure just what date it would be. It was after March 23 of '71.

Q Would it be fair to say it was some time between March and July?

A Yes.

Q Of 1971 that you started to act as an informant?

A Yes, sir.

Q When you say that you started to act as an informant, was there a deal made in connection with the sentence that you had gotten?

A It wasn't even discussed. I asked for nothing and they didn't promise me anything. I just told Mr. Smith I wanted to cooperate, that these people had used me all these years, all these attorneys had used me, they were all Blackburn's attorneys and there wasn't one person at that time I could talk to.

Q Where did you meet Mr. Lanza?

A Mr. Blackburn had brought him to my home.

Q Where is your home located, Mrs. Matthews?

A On *Alder* Street, I guess you call it Altamonte Rolling Hills area.

Q For what purpose did Mr. Blackburn bring Mr. Lanza?

MR. LEVINE: To which we object. It could be hearsay. It has to be predicated on what somebody said out of the scope of the charge here —

THE COURT: Ladies and Gentleman of the Jury, let me say that any conversations that she relates having occurred in the absence of any of these defendants may not be considered by you as going to prove any of the charges against the defendants, unless and until you find by a greater weight of the evidence in this case that the conspiracy as charged has been proven by the Government as respects to Count 1, or that the offense as set out in Count 2, the gambling business enterprise has been proven by the Government.

Let me remind you that both cases, and both counts, the alleged conspiracy or gambling business occurred between October 15, 1970 and October 27, 1971. That is the period during which they have been charged as having carried on the conspiracy to violate the laws of the United States of America in Count 1.

In Count 2, they are charged with having conducted financial or managed to support this gambling business during this same period of time, October 15, 1970, to October 27, 1971. So any conversations that they relate beforehand can't be used to prove the case against these defendants until the Government has proven beyond a reasonable doubt the existence of a conspiracy and a gambling business as I pointed out. All right.

MR. LEVINE: If Your Honor please, the context of this question as to the purpose, what she guesses —

THE COURT: I will let her answer the question.

MR. LEVINE: Can we find out whether or not this is something she was advised?

THE COURT: I think the prosecutor will develop it, that background information. Go ahead.

Q For what purpose did Mr. Blackburn bring Mr. Lanza to your home?

MR. LEVINE: To which we object, if Your Honor please.

THE COURT: The objection is overruled. Answer the question. The objection is overruled.

A He brought Mr. Lanza by. They had a Coke. He was on his way to Sanford to see an attorney, Mike Cleveland, to arrange for a divorce from his wife who was living over in Titusville.

Q Who was present when Mr. Blackburn brought Mr. Lanza to your home?

A I don't believe there was anyone there, sir, just myself.

Q Do you know Mrs. Anne Fusco?

A Yes, I do.

Q How long have you known Mrs. Fusco, when did you first meet her?

A On a trip to Miami after Joe had already gone back, that same year at her home.

Q Where does Mrs. Fusco or did Mrs. Fusco live?

A On 91st Terrace in Miami Shores.

Q To your knowledge, does she still live there?

A Yes, sir.

Q When you first met Mrs. Fusco, who was present?

A Her family, all of them, Janie and her daughter-in-law, two little grandchildren, Joe.

Q How did you get to Miami Shores?

A Colonel and I drove down.

Q You say the Colonel. You refer to Mr. Blackburn?

A Yes, sir.

Q Have you known Mrs. Fusco since that time?

A Yes, I have.

Q Can you recall when that was you last had any conversation or transaction or meeting or what-have-you with Mrs. Fusco, any type of transaction with her at all?

A Yes, sir. To send $1500 —

MR. LEVINE: I object to that and move to strike it. It is not responsive to the question. The question was when and she — she is now volunteering statements.

THE COURT: Just a minute. Rephrase the question.

Q If you could just say — we will go whenever it was —

A A telephone call as late as February or March.

Q Of what year?

A Let me see, now — just after — it was in October of last year, just after the Colonel was taken into custody.

Q Do you know Mr. Martin Segal?

A Yes, sir, I do.

Q When did you first meet Mr. Martin Segal?

A In 1962. He also went to Freddie's.

Q You met him at Freddie's?

A Yes, I did.

Q Was that on the same occasion you met Mr. Blackburn?

A No, I think — sometime after that.

Q Do you recall who was present when you first met Mr. Segal?

A Yes.

Bubba Fuller, myself, and Mr. Blackburn. We all went to jai alai after dinner.

Q Have you known Mr. Segal since that time?

A Yes, I have.

Q Can you recall the last time, without saying what it was, you had any type of a transaction with Mr. Segal?

A I think it had been about a year since he was out at the house on 22nd Street.

Q Since who?

A Mr. Segal.

Q When was the house on 22nd Street — I am sorry, I didn't hear your answer.

A He came to the house on 22nd Street that the Colonel — and this was the last I have seen him, I had left a message at the office but not personal contact.

Q Approximately how long was that?

A I called his secretary during the time that the Colonel was in the house, but I didn't talk to Mr. Segal.

THE COURT: She said she last saw him about a year ago.

Q Do you know Mr. Morris Bort?

A Yes, sir, I do.

Q When did you first meet Mr. Morris Bort?

A In New York, I think in 1962 also.

Q Where did you meet him?

A At the Warwick Hotel.

Q Whom were you with when you met Mr. Bort?

A Mr. Blackburn.

Q Have you known Mr. Bort since 1962?

A Yes, I have.

Q When was the last time that you recall having any type of a meeting or conversation or any type of a transaction with Mr. Morris Bort?

A I had a phone conversation at the time that Colonel was taken into custody, in that period of time in October.

Q Do you know a Mr. Jerry Wasser?

A Yes, I do.

Q Do you know what Mr. Wasser's occupation is?

A I think — he plays the Stock Market.

MR. LEVINE: Predicated upon hearsay, whatever Mr. Wasser's occupation is. He is not charged as a defendant —

THE COURT: Objection overruled.

Q And your answer was what, Mrs. Matthews?

A I believe he had something to do with the Stock Market. He was a friend of Morris's.

Q How long have you known Mr. Wasser?

A I met him at the same time I met Morris, at the same place.

Q Over the course of the years from 1962 until the time of your last conversation, have you had other convesations with Mr. Lanza, Mr. Segal, Mrs. Fusco and Mr. Bort?

A Many times, all during — since I've known all of them.

Q My question would be the same with respect to the year 1970 and 1971.

A Yes, sir.

Q Had your conversation with these gentlemen been in person or on the telephone or both?

A Both.

Q Do you know Mr. Henry A. Finkelstein?

A Yes, sir, I do.

Q When did you first meet Mr. Finkelstein?

A I believe it was just before I opened my pawn shop in 1965.

Q Your pawn shop? What is the name of that?

A Longwood Pawn Shop.

Q Where is it located?

A Seminole County.

Q Also, are you a present owner of the Longwood Pawn Shop?

A No. sir. It was sold.

Q When did you sell it?

A I think it was February of this year.

Q Where was it that you first met Mr. Finkelstein?

A In Miami.

Q Do you recall specifically where in Miami it was that you met Mr. Finkelstein?

A Yes, at his home. We went to look at some things that we could buy wholesale that I could put in my pawn shop.

Q Whom were you with, if anyone?

A Harlan Blackburn.

Q Other than Mr. Finkelstein and Mr. Blackburn and yourself, was anyone else present?

A I think the maid, Avis was home, his wife.

Q Avis is Henry's wife?

A Henry's wife.

Q As best you recall, when was the last time that you had any conversation or meeting or transaction with Mr. Finkelstein?

A He came to my office after Mr. Blackburn was taken into custody.

Q That would be October of 1971?

A Right. He was staying at Bill's house.

Q Bill who?

A Fox.

Q Do you know what Mr. Finkelstein's occupation is?

A No, I don't. He has a motel I think and apartment house.

Q Do you know Mr. Roy Boyd?

A Yes, I do.

Q When did you first meet Mr. Boyd?

A In 1962.

Q Where did you meet him?

A At a house the Colonel rented out on Redbug Road. That is in Seminole County also.

Q Who was present when you met Mr. Boyd?

A There were several people there at the time — the Stillmans were there, Jesse Joiner —

Q The Stillmans?

A Yes. That was some friends of his.

Q Do you recall their first names?

A I think it was Ralph and Oscar, and just a whole general lot of people — and Ralph Strawder.

Q Ralph Strawder?

A Right, yes, sir.

Q Do you recall what purpose you had met Mr. Boyd or why Mr. Boyd was there?

MR. LEVINE: We object. It would be predicated on hearsay and —

THE COURT: The objection is overruled.

A At our first meeting everyone was just there to eat. They were eating I think dinner.

Q Do you know Mr. Donald Smith?

A Yes, I do.

Q Do you know what his occupation is?

A He is an attorney.

Q Excuse me. Going back to Mr. Boyd, do you know what Mr. Boyd's occupation is?

A Cars — he sold cars, had a car lot in Ocala.

Q Do you know what Mr. Lanza's occupation is?

A He was supposed to be with the Union in New York City.

Q Do you know what Mrs. Fusco's occupation is?

A She was employed.

Q When did you first meet Mr. Donald Smith?

A I believe it was in 1968.

Q Where did you first meet him, if you recall?

A I believe it was at his office.

Q Who was present at that time?

A He had a secretary there and Harlan Blackburn took me to his office.

Q For what purpose did you go to his office?

A They were there to talk about business.

Q Do you know Mr. John Newton Fountain?

A Yes, I do.

Q When did you first meet Mr. Fountain?

A I think it was in 1968.

Q Do you recall where it was that you met Mr. Fountain?

A I think Mr. Blackburn brought him to my house.

Q Do you recall the purpose for which Mr. Blackburn brought Mr. Fountain to your house?

MR. LEVINE: To which we object, if Your Honor please, it would be hearsay. It wouldn't be binding on the defendant. That purpose wasn't stated in his presence.

THE COURT: I think you can ask her what transpired.

Q What occurred —

THE COURT: Let her tell in her own narrative.

A At that time it was just general conversation. I don't remember the first conversation when he came to my home. I remember some after, but not that particular one.

Q Is Mr. Fountain present in the courtroom?

A Yes, sir.

Q Can you identify him for the record and the Court Reporter and the Jury?

A Yes, sir. In the second row with a blue-red handkerchief.

Q Would you identify him, and please point to him?

A In the second row with a little red handkerchief.

MR. DEMPSEY: May the record reflect Mrs. Matthews identified Mr. Fountain.

THE COURT: Yes.

Q Would you tell the Jury as best you recall when it was that you last had any type of conversation and transaction, personal meeting or what-have-you, with Mr. Fountain?

A When he called me, I think from Kansas City, just about the time — it was after Mr. Blackburn was taken into custody, he called me long distance about some money.

THE COURT: When was that?

THE WITNESS: Probably late October.

THE COURT: What year?

THE WITNESS: Of last year.

Q Do you know Mr. Vincent M. Razzano?

A Yes, sir, I do.

Q When did you first meet Mr. Vincent Razzano?

A I believe it was in 1964.

Q Where did you first meet Mr. Razzano?

A I think it was at the time Bank of Belleview with Harlan Blackburn.

Q For the benefit of some individuals who may not known, would you tell us where Belleview, Florida is located?

A It is just south of Ocala, about 14 miles, on Route 441.

Q Do you recall the purpose for which — relate what transpired, as you recall it, on the first meeting.

A It was a friendly type conversation of introductions and to get bank accounts opened. At that particular first —

Q Would you relate when it was, as best you recall, that you last had any type of meeting or conversation or any type of transaction with Mr. Razzano?

A Just before I came up here, I had a bank stock certificate I wanted to turn in, and we had a conversation on the telephone about it.

Q I would ask you with respect to Mr. Finkelstein, Mr. Boyd, Mr. Smith, Mr. Fountain and Mr. Razzano, whether or not during the period from when you first met these gentlemen until the last occasion that you related, whether or not you have had personal conversations with them or have met them or talked to them and so forth?

MR. LEVINE: It is vague, broad and ambiguous since it mentions my client's name —

THE COURT: All right. Do it without the individuals.

Q Mr. Fountain, you related when you first met him, will you relate, please, and tell the Jury whether or not you had more than two contacts, that is, the initial one and the last contact with Mr. Fountain?

A Many.

Q My question would be the same with the Defendant, Mr. Donald Smith.

A Many.

Q And Mr. Roy Boyd.

A Many.

Q And the Defendant, Mr. Henry Finkelstein?

A Many.

Q And Mr. Razzano?

A Many.

Q Do you know William Anderson Fox? I believe you already indicated that you did.

A Yes, I do.

Q When did you first meet Mr. Fox?

A I think it was in '64, early '65.

Q Do you recall where it was that you met Mr. Fox?

A It was at the Old Swap Shop on Church Street, in Longwood, Florida.

Q Who was present when you met Mr. Fox the first time?

A Mr. Blackburn, Buddy Peren and some other fellows I don't remember right now, but he came with Buddy Peren.

Q Who came with Buddy Peren?

A Bill Fox, and I was introduced to him at that time.

Q Who is Buddy Peren?

A He was in the numbers business. He has since passed away with a kidney problem.

MR. LEVINE: Your Honor, we object to what Buddy Peren may have done in 1964 and 1965 and prior to this time. It is not an evidentiary matter. Counsel knows that, and I submit he should be more careful in regard to the questioning of this witness.

THE COURT: The objection is overruled.

Q In whose number business, if you know, was Mr. Peren an employee?

MR. LEVINE: I object to that. The proper predicate — I think to go further into it, you are going to have to lay a proper predicate.

Q Would you relate — you said that he was in the numbers business. Would you relate how you know he was?

A I think Buddy at that time was bringing the Colonel some money.

MR. LEVINE: I object to that and move to strike, if this is all she thinks, it is irrelevant and immaterial, not evidentiary.

THE COURT: I won't let her testify to what she thinks, and what she or —

MR. LEVINE: Can we find out the date she was talking about to see if it has any relevancy whatsoever?

THE COURT: Go ahead.

Q Do you know if Mr. Peren was a part of Mr. Blackburn's operation?

MR. LEVINE: I object to that —

THE COURT: Objection sustained. It is a leading question, move along. Just ask the question.

Q Would you relate how you know about Mr. Blackburn and Mr. Peren's relationship?

A The Colonel was sitting there at a business desk in the middle of the swap shop, and Buddy came in and handed him some money with a rubber band around it, and they discussed something about the number of the weekend, and that's all I know.

THE COURT: You will have to ask her when this occurred.

THE WITNESS: This was — I think it was in '64.

MR. LEVINE: To which we object —

A Early '65.

MR. LEVINE: — it is irrelevant and immaterial, certainly beyond the scope of the indictment here, and has no evidentiary value with regard to the defendants here on trial. It may be admissible as to Harlan Blackburn, but not admissible —

THE COURT: The objection is overruled. Let us move on.

Q Mrs. Matthews, how well do you know Harlan Alexander Blackburn?

A We had a close relationship.

Q During the years 1960 to right up until he was in custody, how often would you have conversations with Mr. Blackburn?

A Daily.

Q Who handled, if you know, Mr. Blackburn's business affairs?

A In the financial end of it, I did. I sent a lot of the money.

Q Do you know of your own personal knowledge whether or not Mr. Blackburn has ever been engaged in any legal business?

MR. LEVINE: To which we object. It calls for such a vague —

THE COURT: It calls for a legal conclusion.

MR. DEMPSEY: Excuse me.

Q Would you tell the Jury what Mr. Blackburn's business —

THE COURT: Let her give it in a narrative statement.

A I had never seen him employed.

Q Do you know what his business has been?

MR. LEVINE: Your Honor, without a predicate, we wouldn't have any way of cross-examining the witness.

THE COURT: Just a minute. Why don't you just let her describe in narrative fashion the relationship during this period of time, and she can describe in a narrative fashion what she observed about his business affairs.

Q Do you know Mr. Joseph Frangipane?

A Yes, sir, I do.

Q Does he have a nickname?

A Joe, the Boss.

Q Where did you first meet Mr. Frangipane?

A Avie Brown's house in Miami.

Q Who is ACJ?

A He is a Shylock and also had a sports setup.

Q Where did you first meet Mr. Frangipane?

A I think it might have been 1964. He was at Avie's house.

Q I beg your pardon?

A He was at Avie Brown's house.

Q Whom were you with at the time that you met Mr. Frangipane?

A Harlan Blackburn.

Q Was anyone present at that time other than Mr. Brown and Mr. Blackburn and Mr. Frangipane?

A His wife Shirley.

Q When was it, if you recall, that you last had any type of transaction, either personal conversation or what-have-you with Mr. Frangipane?

A I sent him $125 for his monthly salary maybe five or six months ago. I forgot the exact date. I sent him $125 every month.

Q Was that for a few months, a few years or how long?

A Ever since the Cuban number quit, he had to go

to the dog track in the first three races to get the number. He would call it in.

Q Do you know Mrs. Joyce Fox?

A Yes, I do.

Q When did you first meet Mrs. Joyce Fox?

A Probably three years ago, just before they got married.

Q Do you recall when it was that you last had any contact with Mrs. Joyce?

A The day she called and told me that the Marshal had picked up Mr. Blackburn at the hospital, at my pawn shop.

Q Do you know Mr. Richard Mercier?

A I only seen him one or two times.

Q Do you know Mr. Matthew Smith?

A Yes, I've seen Matthew.

Q Where did you first see Mr. Matthew Smith?

A In my pawn shop. He came in to see Mr. Blackburn. They had a meeting at my shop.

Q When was that?

A I don't know — about '67 or '68. It was in my earlier year of having my pawn shop. I don't remember the exact time.

Q Who was present when you first met Mr. Matthew Smith?

A Just Mr. Blackburn. He came in, there were customers in the store but nobody — I could remember.

Q When was the last time that you had conversation with or any contact with Mr. Matthew Smith?

A I'm —

MR. LEVINE: I object. The witness started to tell before volunteering, she could tell the date, but previously the volunteered —

THE COURT: Sometimes, she doesn't know the date, she explains it with a transaction. I will let her answer the question. Go ahead.

A After Mr. Blackburn was in custody, he came in looking for Bill Fox because two red numbers had hit —

THE COURT: You answered the question. It was after Mr. Blackburn was taken in custody.

THE WITNESS: Yes, sir.

Q Do you recall Orville Johnson?

A Yes, I do.

Q When did you first meet Orville Johnson?

A A few years ago.

Q Do you know what his occupation is?

A He's an attorney in Altamonte Springs.

Q What purpose did you meet Mr. Johnson?

A I think the first time he prepared a will in Mr. Murasco's office before he went on his own.

Q That is M-u-r-a-s-c-o?

A Yes, in Fern Park. He was in the office, had a partnership.

Q How well do you know Mr. Orville Johnson?

A We got to be very good friends the last three years.

Q Has he been your attorney?

A Yes, he has.

Q What type of cases has he acted as your attorney?

A In both.

Q Both what?

A He represented me in the perjury trial. Also, in any business dealings I would have, he prepared the papers.

Q Did anyone else represent you during the perjury trial?

A Yes.

Andy Welch and Mr. Ed Kirkland.

Q When was that perjury trial?

A February of 1971.

Q Where did it take place?

A In Orange County, Florida.

Q Was that a Federal or State case?

A It was Federal.

Q Do you recall the name of the Trial Judge, the Judge who presided at your perjury trial?

A Yes. Judge Duncan.

Q Do you know Mr. Larry Gonzalez?

A I know him as Kahuna.

Q Do you recall when you first met Mr. Gonzalez?

A Yes, in 22nd Street, about a year ago.

Q You say 22nd Street. What do you mean by 22nd Street?

A Mr. Blackburn's house in Orange County.

Q How many houses does Mr. Blackburn own?

A Two —

Q In October of 1971, how many houses did Mr. Blackburn own?

A Two large ones and a small cottage.

Q Where were they located?

A One on 22nd Street, and the other Ann Lake.

Q Do you know Mr. Philip Riffe?

A Yes, I do.

Q When did you first meet Mr. Philip Riffe?

A Several years ago at Charlie's Turkey Farm Bar.

THE COURT: When was that?

THE WITNESS: 1970, I believe.

Q You were referring to Mr. Blackburn reconstructing the house. Of your own personal knowledge, do you know what the cost was to reconstruct the house on 22nd Street?

A He showed me on paper, $90,000.

Q Do you know Mr. William Ralph Strawder?

A Yes, I do.

Q When did you first meet Mr. Strawder?

A In '62, out there at Redbug Road.

MR. LEVINE: Out where?

THE WITNESS: At the house at Redbug Road.

Q How well do you know Mr. Strawder?

A I see him almost once a week all these years, right up to the time he come up here.

Q When was the last time that you saw Mr. Strawder, or had any conversation with him?

A About a month ago.

Q Do you know John Narducci?

A Yes, I do.

Q When did you last have any contact with or see Mr. Narducci — let me ask you this: When did you first meet him?

A I believe it was in '67 or '68 also. I think it was '67.

Q Where did you meet him?

A With Harlan Blackburn. I don't know if it was alongside the road or they stopped by my house.

Q When was the last time you had any conversation or have seen Mr. John Narducci?

A At the dog track at Daytona Beach about a year ago.

Q Was Mr. Narducci a witness against you in your case, the perjury case?

A Yes, he was.

Q Do you know Mr. Pat McCormick?

A Yes, I do.

Q When did you first meet Mr. Pat McCormick?

A It could be '66, '65 — before '65 — '64 or '65.

Q How well did you know Mr. Pat McCormick?

A He was in my home many times, and my shop too.

Q Was he likewise a witness in your perjury trial?

A Yes, he was.

Q Do you know Mr. Robert Steve Shellhorn?

A I met him about three times.

Q When did you first meet him?

A At Blackburn's house on 22nd Street and Rio Grande, just before he went to the hospital last fall.

Q You have already stated Mr. Blackburn was known or had a nickname of the Colonel. Did he have any other nicknames, as you recall?

A Tom Davis, Fat Man —

Q How did you know him or under what circumstances was he known as Tom Davis?

A When he opened up a bank account with that signature.

Q Where was that bank account?

A Orange State Bank in Orlando, Orange County.

Q Who was the party or who were the parties who signed on the account, in other words, whose name was on the account?

A I opened it up.

Q Did you use the name Beverly Roberts Matthews?

A No, I didn't. I used the name of Betty Spencer.

Q Explain the circumstances by which you opened up that account.

A I went there and opened up the account, and Mr. Blackburn told me to use the name of Betty Spencer, opened the account of Davis Wholesale Auto Sales. This was a phony account. There was no such place as Davis Auto —

Q Do you recall when that was?

A No — it could have been clear back in '63.

Q You say there is no business Davis Wholesale Autos?

A No, sir.

Q How do you know that there is no business known as Davis Wholesale Autos?

A He made the name up when he sent me down to open it up.

Q For what reason was the account opened?

A So he could kite checks.

Q When did you open the Longwood Pawn Shop?

A May of '65.

Q Did Mr. Blackburn assist you in opening that account?

A I think he gave me $300 when I first started, and any time I needed any money, the place kind of took care of itself.

Q To your knowledge, how long has Mr. Blackburn had the account known as Davis Wholesale Autos?

A Right up until Mr. Johnson wrote the final check in October of 1971.

Q You mentioned that Mr. Blackburn went into the hospital.

MR. DEMPSEY: I wonder if counsel could agree as to the dates. I think Mr. Levine has al-

ready, still meet Mr. Blackburn on Sundays at his house?

A Yes, I did.

Q Now, you only met him on Sundays at his house?

A Yes, I did.

Q Now, you only met him on Sundays in 1970?

A Wednesdays and sometimes Tuesday afternoon.

Q Now, on Wednesday, that was the day that you take a leisurely drive out to the country and have lunch, and you go maybe to visit Mr. Razzano or somebody else; is that right?

A Whatever business he had to transact.

Q Did your husband know about that?

A I told him.

Q Where is that located?

A On *Haupt* Road, just down from the Colonel's house at Lake Ann.

Q Do you recall the last time that you had any meeting or conversation with Mr. Riffe?

A I believe it was the dog track at Daytona Beach.

Q Do you know when that was?

A It had been a good year ago.

Q Do you know Mr. Donald Miles?

A Yes, I do.

Q Where did you first meet and when did you first meet Mr. Donald Miles?

A He was putting the plumbing in over at the house on 22nd Street when they were reconstructing it.

Q And this is Mr. Blackburn's house?

A Yes.

Q You told your husband that. Now, during the time that you were married to Mr. Matthews, after May of 1970, were you still having intercourse with Mr. Blackburn?

A I haven't been with Mr. Blackburn in four years.

Q You haven't been with him in four years?

A I was more of a secretary than I was a mistress.

Q When did that start, when did you change from mistress to secretary?

A I had very little — it was mostly secretary.

Q When did it change?

A Really, we haven't discussed it very much.

Q Would it be fair to say that the reduction in sentence didn't come to you with any surprise?

A Yes, it was a surprise.

Q It was. Now, Mrs. Roberts, during the course of your direct examination, you testified that you handled the financial affairs, or to some extent, at least, you did, of Harlan Blackburn; is that correct?

A Yes, sir.

Q Over what years did you do that?

A Right up to the present date, from '62 until — he was taken into custody in October of '71.

Q To the extent that you actively participated in his financial affairs, you were instrumental in kiting the checks or aiding and assisting him in kiting checks, were you not?

A Yes, sir.

Q Now, in your trial for perjury, — that means lying?

A Yes, sir.

Q In the Federal District Court, the Government put on an FBI Agent who testified about the fact that you had been instrumental and involved in kiting of various checks for Harlan Blackburn; do you recall that?

quickly as he could get it to me. I opened it at 10:00 in the morning.

Q My question to you is simply this: Do you know when it was that you got the document, could you date it for us, was it in October or November?

A I would say it would be Saturday the 16th. This is written on Friday.

Q You say this because of the fact there is a date on there, the 15th?

A Mr. Johnson brought it to me immediately, sir.

Q How do you know that?

A He brought me notes every day from the hospital.

Q Do you know —

A On instructions from Mr. Blackburn. He had no reason to carry it around in his pocket.

Q You don't know whether he did or did not carry it around in his pocket, do you?

A He told me he brought it to me immediately.

Q So now you are telling us that you received that the next day because that was Orville Johnson told you that he got it the night before and he is giving it to you the next morning?

A Most of those notes had instructions for me to carry out, and I am sure he delivered it promptly.

Q Just answer my question, Mrs. Matthews. Did Orville tell you he got it the night after and is giving it to you this morning?

A He could have.

Q Did he?

A I am not sure.

Q All right. Do you know how long he carried that note around in his pocket?

A I am sure I got it Saturday.

Q You are sure you got it Saturday. All right.

Now, were there any additions or deletions or changes made in that document from the time you received it to the time you turned it over to the FBI?

A I don't see any, no, sir.

Q When did you turn that document over to Mr. Smith of the FBI?

A I believe these were taken out of my safe when they had a warrant for them.

Q You were saving them for him, weren't you?

A They were in my safe when they came with the warrant.

Q You were saving them for Phil Smith of the FBI, weren't you?

A I was saving them in the safe.

Q At that point in time in October, you were already an FBI informant, weren't you?

A Yes, sir.

Q And you were saving that document to turn it over to Phil Smith; is that correct?

A I save all of my documents; yes, sir.

Q To turn over to Phil Smith of the FBI; is that correct?

A Yes, sir.

Q Thank you. Exhibit 195 appears to be just a portion of a piece of paper. What happened to the upper half?

A I got this out of Mr. Johnson's office, and he had the legal pad and some notes on top of this, didn't pertain to instructions to me. As Mr. Johnson was there every night, Mr. Blackburn had a whole legal pad like so, and he would write everybody a message to do, some to Kahuna, some to me, some to Peggy, whoever was needed to deliver messages. This particular part pertained to me and so we took it and cut it off like so and I have had it.

Q You say the top didn't pertain to you. Can you read the top message?
time between October 2 and October 19, you received that document; is that what you are telling me?

A Yes, sir.

Q Now, what did you do with the document after you got it?

A I called all these people.

Q What did you do with the document?

MR. DEMPSEY: Your Honor, I object —

A This piece of paper —

MR. DEMPSEY: — it is beyond the scope of voir dire to establish its admissibility.

THE COURT: It is all right.

BY MR. LEVINE:

Q What did you do with the piece of paper?

A I followed the instructions on this and put it in my safe.

Q Did you put it in your safe by prearrangement with Mr. Phil Smith of the FBI?

A No prearrangement. I put it there any time I had it.

Q You mean you didn't have an arrangement with them that you would save all the things you got from Harlan Blackburn to turn over to him in October of 1971?

A In so many words, no, sir. He didn't say — he never promised me nothing, and I only gave him —

Q You only gave him what you wanted to give him?

A He never told me to give him anything.

Q Did you hold back certain things?

A I certainly didn't.

Q Did you give him everything?

A Everything I could find.

Q Is that document in the same form as you see it there before you it was when you received it?

A No. I tore it off in the office, my part of it.

Q Is the document you have before you in the same form as when you received it?

A Yes.

MR. LEVINE: I have no further questions of this witness.

THE COURT: Any questions, Mr. Sigman?

MR. SIGMAN: No.

THE COURT: Mr. Haley.

MR. HALEY: No questions.

MR. LEVINE: Your Honor, we submit that 194 has no relevancy whatever. The statement from Blackburn to this witness about some general

Q Could you tell me, ma'am, how it came about that that sentence was reduced?

A I can tell you about that also.

Q Would you please?

A You want to know how Mr. Smith — I called him first, I called him when he told me if he could be of any help, just to call him. So when I made up my mind that I needed someone to talk to, that's how I contacted Mr. Smith first.

Q My question is this —

A Yes, sir.

Q — your sentence was reduced?

A Yes, sir.

Q From two years in jail?

A Yes, sir.

Q To how much?

A Three months.

Q Have you ever served any time in jail?

A I am on my way.

Q You mean you were convicted back in the early part of 1971, and to date you haven't spent one day in jail?

A The appeals have just — my appeal, the Court like you're supposed to — how it came about my reduction of sentence was Mr. Judge Duncan is a visiting Judge, and he goes back from the Orlando area back to Missouri, and I felt that if he left there, it would be hard to get in front of, you know, to ask him for a reduction of sentence because of my previous record, so I went to the attorney and asked him for this reduction in sentence.

Q Which attorney?

A To Mr. *Stichter*.

Q Mr. Stichter?

A Yes, sir.

Q Who is he?

A He is an attorney in Tampa.

Q And you went to Mr. Stichter as a private attorney or Assistant U.S. Attorney?

A I hired him as an attorney.

MR. DEMPSEY: Objection, Your Honor — Mr. Levine knows that Mr. Stichter has not served as an Assistant United States Attorney in about 10 years.

THE COURT: Is that right?

MR. LEVINE: I know that Stichter is not connected with the office at this time and hasn't been for some period of time.

THE COURT: Would you say 10 years?

MR. LEVINE: I think that is accurate.

THE COURT: The members of the Jury will totally disregard, absolutely wipe from your minds any inference that the United States Attorney's Office was employed by his question to obtain a reduction of sentence or to appear before United States District Judge in Orlando for that purpose. Mr. Stichter has not been — can we stipulate that or should we need evidence?

MR. LEVINE: No.

THE COURT: — has not been with the United States Attorney's Office in some 10 years.

Q Had you ever met Mr. Stichter before?

A No, sir.

Q Did you know when you went to Mr. Stichter that he had formerly been an Assistant United States Attorney in Tampa?

A I did not.

Q You just happened to come to him?

A No, sir.

Q Someone recommended you to him?

A Not exactly. I asked for an honest attorney away from the Orlando area that was not involved with Harlan Blackburn.

Q Whom did you ask?

A I asked Mr. Smith.

Q Mr. Smith of the FBI gave you Don Stichter's name in Tampa?

A I made my own arrangement after that.

Q But my question is, did Phil Smith of the FBI give you Don Stichter's name in Tampa?

A Yes, he did.

Q Then you called Mr. Stichter to make the arrangements to see him about a reduction in your sentence?

A No. I went over to him and he — I took — we went down to Mr. Kirkland. He had prepared the appeals in New Orleans, and I absolutely was not going to have one of those other attorneys representing me in the Orlando area, and Mr. Stichter recommended my appeal for the Supreme Court and he advised me on that. It was way after that on the reduction.

Q Well, was the matter appealed to the Supreme Court, or did you abandon it, did you abandon the appeal or was it pursued, to your knowledge?

A It was sent to the Supreme Court, sir.

Q Was it pursued, do you know whether or not Mr. Stichter in your behalf ever filed a brief or anything else to the Supreme Court, other than the initial papers?

A I don't know all the legal procedures, whatever was necessary was done, and I asked him also at that time, later before Judge Duncan was to leave and before it came back to the Supreme Court could we get an audience in front of Judge Duncan to talk about a reduction of sentence before he went to Missouri and left our area.

Q Did Stichter get the audience for you before Judge Duncan?

A I didn't have to appear. He did, sir.

Q You mean you didn't even go before the Judge? Where was he seated at that time?

A He was still in Orlando and leaving in about two days.

Q Did Mr. Stichter come over to Orlando, to your knowledge?

A He came over to Orlando and called me when he got there. He talked to the Judge. I did not.

Q Do you know whether or not Mr. Dempsey or anybody from the United States Attorney's Office was present when the Judge was spoken to by Mr. Stichter about your reduction?

A I wasn't there.

Q Did Mr. Stichter tell you?

A Mr. Stichter didn't tell me, only that he was there.

Q Do you know whether or not Mr. Phil Smith was there at that time?

A I don't know, sir.

Q So Mr. Stichter then reported to you, what, in regard to your reduction in sentence, what report did he make to you?

A That when the mandate came down, the Judge would tell me what the sentence would be and then sentence would be three months.

Q So you knew at that point in time when Mr. Stichter went over there how much of a reduction —

A This was a month ago. This was just a few days ago.

Q You say just a month ago?

A Yes, about like that, six weeks.

Q You mean during the month of April?

A I think so.

MR. DEMPSEY: Your Honor, I object to the question. I don't think there is any evidence —
(Questions and answers were read.)

Q When did Mr. Stichter report to you that he had been over to see Judge Duncan?

A The same day that he went.

Q When, when was that?

A It was in April of this year.

Q April of this year?

A Yes, sir.

Q Did he report to you after the meeting with Judge Duncan the amount of the reduction and sentence you would get?

A No, sir. He said the Judge would take it under advisory and would notify him at a later date.

Q Did Mr. Stichter tell you that he intended to advise the Judge of the fact that you had been an FBI informant, as a basis for the reduction in sentence?

A I don't believe he discussed it with me, sir.

Q Do you know what ground Mr. Stichter urged on the Judge to reduce your sentence?

A That I had never had a previous record.

Q Didn't the Judge know that when you got sentenced?

A I am sure he did, with the pre-sentence investigation.

Q A pre-sentence investigation was conducted of you after the Judge evaluated it, he put you in jail for two years, he said that is where you have to go?

A Yes, sir.

Q Well, what was it that urged, to your knowledge, in your behalf, to get that two-year sentence reduced to 90 days?

THE COURT: Mr. Levine, let us just calm down a little bit. Are you asking her to tell you what the lawyer told her, or are you asking her to repeat what went on between the lawyer and the Judge in his chambers?

MR. LEVINE: She wasn't there, so it would have to be what the lawyer told her.

THE COURT: All right.

Q I want to know what you were advised, what was urged in your behalf to get the reduction of sentence, would you tell us?

A He didn't discuss it with me, sir.

Q Not at that time nor to date?

A No, sir. I left it completely up to him.

Q When you learned of the reduction and that the order had been entered in April, did it come to you as a surprise?

A You mean surprise that it was three months?

Q Did it come to you as a surprise your sentence had been reduced?

A I was pleased.

Q How about a surprise?

A Yes, because I fully believed I wouldn't have got it.

Q You fully believe you wouldn't have gotten it unless what?

A I don't know how Court systems work or how Judges work. I don't know how the reduction of sentences work either, sir.

Q Do you know of anything that was submitted to Judge Duncan today and by the United States Attorney's Office or the FBI to aid them in making his decision as to what to do with you?

A I never read anything.

Q Weren't you told that they submitted things to the Judge in your behalf?

A Not that I can remember. If they did, I can't remember it, sir.

Q So you have no recollection of any conversation between yourself and Mr. Dempsey or Mr. Smith in that record; is that right?

A I wasn't there in any conversations with the Judge.

Q I mean afterward, haven't you been told to date what they had made known to the Judge?

A Yes. But I am going to go to *Alderson* for three months.

Q How about your cooperation and the basis for reduction, did they ever tell you what they had submitted to the Judge in that regard?

A Nobody gave me no medals.

Q Would you just answer my question?

THE COURT: He wants to know whether or not Dempsey or Mr. Smith had ever gone to the Judge in your behalf.

THE WITNESS: I believe Mr. Dempsey told me he talked about my cooperation. I don't know to what extent, Mr. Dempsey didn't reveal it.

Q When did Mr. Dempsey tell you this?

A Sometime in April.

Q Before you were advised of the reduction or after you were advised of the reduction?

A It was all during the same period, sir. I don't remember.

Q Well, dates are important. You testified about it on direct. Would you please think for a moment and tell me whether or not Mr. Dempsey told you before you were advised of the reduction, or after you were advised of the reduction, of what he had done in regard to a presentation to Judge Duncan to get your sentence reduced.

A Yes, sir.

Q Did she ask you for a name of an attorney in Tampa, and did you suggest a name to her, John Stichter?

A Yes. This was much later. I don't remember the exact month. Her appeal — she was concerned with her appeal and Mr. Edward Kirkland was her attorney at that time. She was not happy with Mr. Kirkland, and she had a problem in Orlando that she knew that Mr. Blackburn pretty well had the town sewed up from what she related to me, and she was concerned that she could get an attorney that she could trust in Orlando —

Q Did you give her the name of a trusted attorney in Tampa?

A She asked —

Q Just answer my question, Mr. Smith.

A Yes, I did.

(Exerpts Mr. Smith)

Q Does the FBI generally recommend attorneys to people charged with crimes or where crimes are being prosecuted?

A No, sir. And I explained that to Mrs. Matthews. I told her I would talk to Mr. Dempsey, we could not give the name of an attorney. I talked to Mr. Dempsey and I have suggested Mr. Stichter, and I gave the name to Mrs. Matthews and she later contacted Mr. Stichter in Tampa.

Q After Mr. Stichter came in the case and Mrs. Matthews was successful in getting her two-year sentence in jail reduced to 90 days, at least?

A Yes.

MR. LEVINE: I have no further questions.

THE COURT: Mr. Sigman.

MR. SIGMAN: No questions, thank you.

THE COURT: Mr. Haley.

MR. HALEY: No questions.

THE COURT: Mr. Dempsey.

MR. DEMPSEY: No questions, Your Honor.

THE COURT: Thank you.

(Witness excused)

THE COURT: Call your next witness.

MR. DEMPSEY: Mr. Fox, please.

MR. LEVINE: Before Mr. Fox comes, may we approach the Bench?

* * *

(Side Bar Conference with the Reporter.)

MR. LEVINE: Your Honor, in the light of the testimony that has now come out to this witness, I would ask at this time for a mistrial on behalf of my client. If Your Honor will recall, during the course of the cross examination of Beverly Roberts, I suggested there was a relationship between the United States Attorney's Office and the retention of John Stichter. Your Honor chastized me in the

presence of the Jury on an objection of Government counsel and on your own iniative for making that kind of suggestion at all, and the Government required that I stipulate in the presence of the Jury that John Stichter has not been associated with the Government for some 10 years. During the course of the cross examination, it developed Mr. Smith made the recommendation to her to obtain John Stichter. Now, it clearly appears that Mr. Dempsey and Mr. Smith together —

THE COURT: I understand. As far as Beverly Roberts was concerned, it was Smith who made the recommendation.

MR. LEVINE: Yes, Your Honor, but in the presence of the Jury —

THE COURT: Whatever I did is in the record. The point of the matter is, if my recollection subject to whatever is in the record, whether or not the lawyer was one of the U.S. Attorney's Office was representing her — your motion is denied.
(The Jury was excused.)

* * *

THE COURT: All right.

(Philip Smith resumed the stand.)

DIRECT EXAMINATION

BY MR. LEVINE:

Q Your name is Philip Smith, and you are with the Federal Bureau of Investigation; is that correct?

A Yes, sir, it is.

Q Mr. Smith, did you learn of the wire taps in this case in advance thereof?

A In advance of their being placed on the respective telephones?

Q Yes, sir.

A No, sir, I did not.

Q When did you first learn of wire taps?

A I had heard — I would say in the latter fall of 1971, just the fact that the FDLE, Florida Department of Law Enforcement, had been conducting investigation in regard to lottery and gambling in the Central Florida area, and that they were possibly using wire taps, but I did not know the exact telephones that they had the wire taps on.

Q Well, the Court has called for the transcript, and I don't have the benefit of it at the moment. I am going to wait for that. But I have a recollection — and correct me if I am wrong — in the pre-trial proceedings, you testified you assisted in connection with the preparation of the information for probable cause in connection with the wire taps; is that an accurate recollection on my part?

A No, sir, it is not. I did not assist in the preparation of probable cause or any of the wire taps that the FDLE had in this case.

Q When did you first communicate with FDLE?

THE COURT: About what?

Q About this case.

A I attended a meeting with Mr. Dempsey's own office. I believe it was September 18, 1971.

Q The first time you had any communication whatsoever with the FDLE in regard to the wire taps in this case?

A In regard to any specific details. I talked with perhaps one or two others, the information I stated before was of a general nature that they had a gambling investigation going on, and they might be using wire taps.

Q So, therefore, sometime prior to this date, you had communication with the FDLE about the general nature of the investigation that they were continuing; is that right?

A It was a very limited conversation —

Q Just answer the question, and then you can tell me whatever you want to say. Did you have that com-

munication with them sometime prior to September of 1971?

THE COURT: What communication?

Q Communication with them about the fact that an investigation was being conducted of gambling and lottery in the middle part of the State of Florida, and the fact that wire taps were being used?

A Yes, I did. It was a very limited conversation because the FDLE were being very secretive about the fact, the techniques that they were using, and I didn't pry into this investigation or ask them any questions.

Q At that time, at the time that you had that conversation or conversations with them before you met with them and Mr. Dempsey, Mrs. Beverly Matthews Roberts or Mrs. Beverly Roberts had been an FBI informant, particularly an informant for you; is that not correct?

A Yes, sir.

Q And she had agreed at that point in time — this is at the time you were talking to the FDLE — a Government witness in a case that would be made against Harlan Blackburn in the lottery and gambling operation, had she not?

A Prior to September 18, 19 —

Q Yes.

A No, sir, she had not.

Q She hadn't agreed, you mean she was just giving you information, and you hadn't discussed with her the prospects of appearing as a witness?

A No, sir, I had not.

Q Did she ever refuse or decline —

MR. DEMPSEY: I object, Your Honor. That doesn't have anything to do —

THE COURT: I think it is argumentative, Mr. Levine. This indictment was returned —

MR. DEMPSEY: November 1.

MR. LEVINE: I would submit under the case of United States Reports vs. Leta, 332 Fed. Supp. 1357, a 1971 case, that is a proper question.

THE COURT: I understand that. I am just saying you are a little argumentative.

MR. LEVINE: All right.

Q Mr. Smith, did the discussion one way or another occur between yourself and Beverly Matthews as to her appearing as a witness in the gambling case involving Blackburn-Fox and others which she was giving you information on?

A No, sir. We did not have a specific case at that time that we could discuss.

Q When did you first discuss her appearing as a witness for the Government in connection with that investigation?

A On October 27, 1971.

Q On that occasion, did she agree that she would appear as a Government witness?

A On October 27, she did, yes, sir.

Q What was it that specifically prompted that conversation?

A The case in regard to the — we had had a meeting with the Florida Department of Law Enforcement, and we had a good idea then — I did, and Mr. Dempsey, as to what information they might have available and the type of case that might develop, and we realized that we had grounds for the gambling conspiracy then, and we were going to try to bring in the people that the FBI had been investigating for years into the operation at that time, and we discussed with Mrs. Matthews the fact as to whether she would be a witness in that ensuing case, or the case that we looked forward to presenting to the Grand Jury.

Q Let us go back to your September meeting with the Florida Department of Law Enforcement and yourself and Mr. Dempsey. That meeting took place at the United States Attorney's Office or elsewhere?

A United States Attorney's Office in Tampa, Florida.

Q Tell me who was present on that occasion?

A Mr. Dempsey, the United States Attorney's Office, Mr. Larry Campbell of Florida Department of Law Enforcement.

Q What position did he occupy at that time?

A I think he was supervisor of the Tampa office of the Florida Department of Law Enforcement. Mr. Ed Miller —

Q What position did he occupy?

A I think he has a position as field counsel. I think he is out of Tallahassee with the Florida Department of Law Enforcement.

Q Did it come to attention at that time he was the one preparing the affidavits and making the presentations to Governor Askew and to Judge Adkins?

A Yes, sir.

Q You knew that then, right?

A At that meeting, I did; yes, sir.

Q Who else was present?

A I believe Mr. James was present also, Mr. William James, United States Attorney's Office.

Q Anybody else from the Florida Department?

A No, sir, not that I recall.

Q It was specifically made known to you on that occasion that wire tap was being used by the Florida Department of Law Enforcement in connection with the investigation, was it not, as of September?

A Yes, sir, it was.

Q Was there a round-table discussion as to either the progress that they had made or the status of your investigation and what you all had accomplished and what you were contemplating doing together?

A No, sir.

Q Well, what did you all discuss?

A The discussion was mainly with Mr. Dempsey as to the fact of the FDLE had brought this case along for over a year and a half, and they were interested in Federal prosecution at that time and the possibilities as to whether they could gain Federal prosecution in regard to the case they had developed. It was discussed at this time. I was there as a representative of the FBI to assist the United States Attorney's Office in preparing the case for trial.

Q Was there any advice given to these people from the State of Florida that the Government would aid and assist or take over the case for Federal prosecution?

(Exerpts Mr. Dempsey)

A Bernard Dempsey.

Q You are an Assistant United States attorney?

A Yes.

Q You are in charge of the prosecution of this case?

A Yes.

Q Mr. Dempsey, when was it that you first became aware of the fact that Beverly Roberts Matthews was furnishing information on a confidential basis to the Federal Bureau of Investigation?

A Well, I became aware that she had contacted Mr. Smith. Shortly after she contacted Mr. Smith, within a matter of a couple of days.

Q That would have been some time during July —

MR. LEVINE: Wait a second. Don't lead him. He is an attorney. He can answer the question.

THE COURT: Just a minute —

Q Do you recall the approximate time that this occurred?

A Yes. It was in July. I think it was a couple of days after Mr. Smith told me that he had been contacted by Beverly Roberts, a few days previous to him telling me that, and that was in July of 1971.

Q During September of 1971, did you have occasion to meet with agents of the Florida Department of Law Enforcement concerning this case?

A One agent in September of 1971.

Q Who was that?

A Supervisory agent Campbell of the Tampa, Florida office.

Q Did you have a meeting with Mr. Miller and Mr. Campbell?

A That's correct, right.

Q Who else was present at that meeting?

A That was — you were present, Mr. Miller was present, Mr. Campbell was present, Mr. Smith was present of the FBI, and I was there.

THE COURT: Who was Mr. Miller?

THE WITNESS: Mr. Ed Miller is field counsel for the Florida Department of Law Enforcement.

Q At that time, did we have any discussion concerning Bill Fox's involvement in this case?

A Yes.

Q At that time, were you aware of the fact that Fox was an intended — a person whose telephone lines they intended to tap?

A The answer to your question would be no, for this reason: I did know that he was a subject of their investigation. I did know that they intended to proceed with their investigation against Mr. Fox, and I also know that they intended to use wiretaps. But I had no idea — didn't ask him wasn't told — as I recall that they intended to tap the two lines that they tapped. We weren't advised what telephones. I used that because, as I recall, in this case there is evidence that we referred to the Mercier taps, and one of the taps as I recall is a tap of an apartment rented by Mr. McCuen — we call it the Mercier taps. I didn't know what taps, telephones they were going to tap.

Q When did you know they intended to tap or did tap Bill Fox's line?

A Well, his line?

Q Yes, the line at the Capistrano Apartments.

A Well, I was aware — they advised me in September — I say they — Mr. Miller advised me on September 18, 1971 that the taps of the Florida Department of Law Enforcement had gone as far as they had, and that did not include Fox. He didn't tell me. If he did, it didn't mean anything in particular, what telephone numbers. He told me who the subjects were, some of whom didn't mean anything to me.

As to Fox, the first time I knew that Fox's telephones were tapped, were being tapped was on October 4,

(EXERPT MR. SMITH)

MR. JAMES: We continued the case from March. I believe that is where Mr. Smith testified.

THE COURT: You examined him beginning on 287.

Q Mr. Smith, I would like to read to you the portion of the transcript of your testimony taken on February 5, 1972. Reading from Page 278, and I believe this was by Mr. Hogan.

"Q When did you become aware that the Florida Department of Law Enforcement were using wire interception by you?"

I mean the Federal Bureau of Investigation.

"A I would say it would have been — have to be sometime in the early part —

Q Doesn't your report reflect that, this type of information you have a report of?

"A You mean the actual wire intercept?"

The Court makes a statement.

"He just wants to know when the FBI became aware of that fact that the Florida Department of Law Enforcement ws going to tap the wires of this case.

"A I'd say sometime prior to that because some of our agents had cooperated with the Florida Department of Law Enforcement in gathering probable cause, and we knew about the preliminaries. They are actually obtaining the wire tap, that they were heading for a wire tap on the first individual that the yhad."

Now, Mr. Smith, were those questions asked of you and those answers given by you?

A Yes, sir, they were.

Q So it is fair to say that the FBI, if not you personally, aided and assisted the Florida Department of Law Enforcement in gathering probable cause for the very first wire tap; is that not correct?

A Yes, sir, they did.

MR. DEMPSEY: Your Honor, if I may, I would like also to state that it is specified in the application for an order that the FBI assisted in the first wire tap, in the sworn affidavit.

Q Now, would you tell me, sir, who it was who aided the Florida Department of Law Enforcement in gathering probable cause for the first wire tap were agents of the FBI?

A. The only one I know of is Special Agent Brook Roberts.

What position did he occupy at that time,

A. It was.

Q. Was that advice given to the State representative by Mr. Dempsey on that occasion?

A. Yes, sir.

Q. To your knowledge, had he gotten prior authorization from the Department of Justice, one for the interview ad meeting, and two for that type of authorization or advice to the State officials?

A. I don't know.

Q. You don't know. But it is clear that you came away from that meeting with the clear understanding that the Federal prosecution would take over, and the State would turn over all this information to you all. so through a giant effort prosecute the people that they were investigating, and prosecute the people you were investigating, right?

A No, sir. At the meeting it was discussed, but I think Mr. Dempsey had some questions that he raised with Mr. Ed Miller, the Florida Department of Law Enforcement, and asked him to consider them carefully before they went on. I of course was only a representative, and I had to go back to my office and report to my supervisor what had taken place there. As far as I was concerned, there was no decision reached on that date.

Q. What day or date was the final decision made by Mr. Dempsey or the Department of Justice that they would take over the prosecution of all of these people?

A. I don't know the exact date. I communicated with Mr. Santiano, the Special Agent in charge. He later talked with Mr. Dempsey. I don't recall the exact date. I don't know whether Mr. Dempsey made the final decision, what date.

Q Was it still in September?

A It was in the latter part of September. It would just be an estimate.

Q That is your best recollection?

A. Yes, sir.

Q. Don't you have some memorandum that reflects the progress of the situation, and you write down everything, don't you, when the meeting was, so we can get the precise date; two, the date you reported to your superor; or three, the date that the decision was made for the Federal Government to take over the prosecution; don't you have that in your memorandum?

A. I would have one of the date Mr. Dempsey and I and the other individuals from the Florida Department

of Law Enforcement met. As to the exact date when Mr. Dempsey made the decision, I don't feel that I ould have that.

Q You also have the date you reported to your superior, Santiano?

THE COURT: Wouldn't Mr. Dempsey be the best witness to supply the date?

MR. LEVINE: Yes.

THE COURT: He said he doesn't know. It was Mr. Dempsey's decision.

I understand that, if Your Honor please. I have no hesitancy in calling Mr. Dempsey.

MR. DEMPSEY: I have no hesitancy —

THE COURT: All I am saying is Mr. Smith doesn't know.

BY MR. LEVINE:

Q Mr. Smith, then after the September meeting that you told us about did you become actively involved in this joint effort?

A I would say within a — it was subsequent to the removal of the taps from the telephone of Mr. William Fox, and when the taps were finished, I assisted them in starting in analyzing the tapes in regard to the bookmaking aspects of the investigation.

Q You mean that is when you actively participated, you didn't do anything in connection with the investigation before that?

A I may have reviewed some of our files and got our information together in regard to some of the people I thought may be involved.

Q Did you ever go over and look at the operation that they had for the taps?

A No, sir, I never did.

Q Did you ever communicate to any of the mem-

bers of the Florida Department of Law Enforcement the fact that Beverly Matthews Roberts was an FBI informant?

A You say did I ever —

Q Yes.

A Yes, I did.

Q To whom did you make that communication?

A To Mr. Frank Troy and Jeffery Monge.

Q And Mr. Troy was occupying what position in connecton with the State investigation, and also tell me what position Mr. Monge was occupying at that time?

I believe Mr. Troy was the case agent in charge of the investigation, and Mr. Monge was assisting him in the investigation of their case.

Q To your knowledge, was that information, either by you or by them, communicated to Mr. Miller who was the man in Tallahassee representing the Florida Department?

A I assume it was. I don't know.

Q Can you date for me when it was the first occasion that you advised the Florida Department of the fact that Beverly Matthews Roberts was an accomplice and provide the information to you?

A I can very well. It was on April 24, 1971 when I came to Jacksonville.

Q So you withheld that information from them all that time?

A. Yes, sir.

THE COURT: The FDLE?

THE WITNESS: Yes.

Q Did you at any time review the applications for the order authorizing wire taps?

A No, sir. I personally did not.

Q You personally did not. Did somebody else to your knowledge with the Department of Justice, United State Attorney's Office or the FBI seem to be taking yours out of it?

A I didn't review them.

Q You never read them, never reviewed them?

A I read through them, but I didn't hat you call review them in detail.

Q You read them, is that hat you are telling us?

A A few pages. I didn't read all of it.

Q When did you do that, Mr. Smith?

A I believe it as subsequent to the meeting on — I don't recall the exact date. I know it as subsequent to the meeting of September 18.

Q Do you recall which documents in regards to the wire taps you — I take it you casually read or reviewed?

A I don't recall which ones. There were many of them.

Q Were any of the documents or copies of these documents, the applications of the orders of prior taps or taps that were then in full force and effect presented at the meeting between yourself, Mr. Dempsey and the Florida Department people?

MR. DEMPSEY: May I have the question again, please?

(The last question was read by the reporter.)

A You mean presenting, whether they discussed or just the fact that they were in existence.

THE COURT: He wants to know whether or not any of these documents were presented to the people at that meeting on the 18th?

Q Whether they were given to any of the people, and whether they were reviewed; if not that, whether they were discussed. Give us all the aspects of that, Mr. Smith.

A I don't recall them presenting them. I didn't get any. I don't know whether Mr. Dempsey did or not. I don't know.

Q Were they discussed?

A The fact that they had orders and would sign them and that sort of thing was discussed, yes.

Q You mean the mechanics of how that procedure had followed through generally had been discussed on that September meeting?

A Generally, yes, sir.

Q Did you learn in that September meeting of the fact that there was a contemplated tap — strike that —

When did you learn of the fact that Fox's phone, that is 71-07 tap was going to take place?

A I believe it would have been on April 18 meeting — I am sorry — on September 18, '71 meeting.

Q So you knew prior to the time of the tap that that contemplated tap would take place, is that a fair statement, isn't it?

A Yes, sir. I would say that I knew they were contemplating.

Q Are you saying to me that this information as communicated to you and Mr. Dempsey at that meeting?

A I am pretty sure it was discussed, yes.

MR LEVINE: Your Honor, the witness I know is trying to be truthful and candid. I am sure if he had his notes for that meeting so he could refresh his recollection, it would aid in getting all of the facts that were discussed. May I call upon the witness to get the notes?

THE COURT: Do you have any notes on it?

THE WITNESS: I don't have them here, sir. They are in Tampa.

Q You don't have them down here?

THE COURT: In Tampa.

MR. LEVINE: All right. We will have to rely on your recollection.

Q Were you advised, to your knowledge was any member of the Department of Justice advised of FBI agents or Mr. Dempsey of the fact that after the September 18 meeting, as a matter of fact, an application had been filed for the Fox tap, and that an order had been entered authorizing the Fox tap?

A Yes, sir.

Q Were you aware of the fact that the Fox tap, as I have characterized it, 71-07 and 71-07-A, or 71-07 or 71-07A was going on while it was going on?

A Yes, I was.

Q How did you know about the fact that the applications and the orders for the Fox tap had been presented and signed?

A I don't recall if Mr. Dempsey told me or if Mr. Campbell of the Florida Department of Law Enforcement. At tha time, we were discussing the fact as to wheher the FBI was going to be able to assist the U. S. Attorney's Office, and as to whether Mr. Dempsey was going to actually be authorized to Federally prosecute the case.

Q Can you date that for me?

A No, sir. I can't give you a date exactly.

Q What is the time before the Fox tap took place actually was installed?

A I don't recall.

Q To your knowledge, were any of the Department of Justice people, FBI, United States of America people as opposed to State of Florida people present when any documents were presented to Governor Askew in connection with the Fox tap for his execution?

A If any of the FBI Agents or Department of Justice?

Q Yes, anybody connected with the United States of America as opposed to the State of Florida.

A Present when the FDLE presented the application?

Q Yes.

A Not that I know of.

Q How about as it may relate t Judge Adkins, was there anybody from the Federal Government as opposed to the State Government present when the application as presented to him and the order was signed by him?

A. No, sir, not that I know of.

Q During the course of the Fox tap, to your knowledge, were any United States of America people as opposed to the State of Florida people ever present during the course of the tapings, or the tap?

A No, sir,not that I know of.

Q Did you all stay away pursuant to prearrangement?

A No —

THE COURT: Stay away from what?

Q Stay away from the place where the tapes were being made of the tap, telephone calls by prearrangement?

A No, sir. They never had told us where they were. They weren't confiding in us with regard to the investigation, the mechanics of it.

MR LEVINE: Your Honor, do you have the transcript there before you of his prior testimony? If so, I would like to take a quick look at it.

and out of what office?

A He's a Resident Agent out of the Lakeland, Florida office.

Q As Resident Agent, he is in charge of that office?

A Yes, sir. I think he is the Senior Resident Agent there.

Q If he is not the Senior Resident Agent, the designation of Resident Agent means someone who is in charge of some aspect of the office or in control of the office?

A No. A Resident Agent is an agent assigned to a Resident Agency, assigned away from the headquarters city.

Q You mean he wasn't in any sort of supervisory capacity there?

A Not necessarily. He is designated as a Senior Agent in Lakeland.

Q When were you in communication with Mr. Brooks — is it Brooks or Brooks Roberts?

A Brook Roberts.

Q Were you in communication with him at any time during the period of time that he was assisting the Florida Department of Law Enforcement in connection with their establishment of probable cause?

A No, sir, not in regard to his assisting the Florida Department of Law Enforcement, or not in regard to the Florida Department investigation in this case.

Q My question is, were you in communication with him about your investgation of ths case, the FBI aspects of this case, while he was assisting the Florida Department of Law Enforcement?

A No, sir.

Q You were not?

A No, sir.

Q Was there a Cocoa agent also involved or out of the Tampa office who were involved and assisted you in connection with your investigation of this case?

A Yes, sir.

Q Out of what offices were the other agents generally operating?

A Cocoa, Florida resident agency, Daytona Beach, Miami.

Q You had occasion to interview Mrs. Matthews with one or more agents present. Could you tell me from what office those agents came?

THE COURT: When are you talking about?

MR. LEVINE: When she was an informant.

THE COURT: When. That is material.

MR. LEVINE: All right, I will —

THE COURT: You are operating under the assumption that in July 1971, they had a viable witness who was willing to get on the witness stand and testify in the same fashion as she did yesterday.

MR. LEVINE: Absolutely.

THE COURT: I understand what your position is. But it becomes material as to when, you see, she had the conversation with the Florida Department of Law Enforcement.

MR. LEVINE: So we can read the question.

THE COURT: The reason I say that, Mr. Levine, if she wasn't a willing witness to testify to the extent she did yesterday and the day before on the witness stand, the day she went to the FBI in 1971, and sometime between then and when she got on the stand yesterday, she became in effect a viable witness and not just a confidential informant.

MR. LEVINE: If Your Honor please, it is self-evident, and that they never asked her. When they first asked her, she said yes. I don't think that we are bound by their failure to ask her.

THE COURT: I understand that, Mr. Levine.

MR. LEVINE: Fine.

THE COURT: But I want to know when they had the meeting.

MR. LEVINE: Yes, sir.

THE COURT: Either you ask him or I will.

MR. LEVINE: I don't mind asking the witness that.

(The last question was read by the Reporter.)

Q What I want to know is, did you have occasion to interview Mrs. Matthews with any other agents present, either FBI or Florida Department of Law Enforcement; if so, tell us where the agent or — where their agency was or their headquarters was, and the date or dates of those interviews with the other agents present, would you give that to us?

A I can give you the agents. The exact dates — we had many meetings and there was not always an agent there at the time. On many occasions Mr. Dempsey was there and myself. But the other agent was James J. File. He was in the Orlando resident agency. On one other occasion, Agent Hubert O'Hara from Las Vegas, Nevada office was there.

Q Did you ever interview her in the presence of any members of the Florida Department of Law Enforcement?

A Did I ever?

Q Yes, sir.

A Never had an interview. A discussion at one time, yes, sir.

Q You mean you asked the questions and she answered them?

A I'm sorry. Yes, I interviewed her.

Q The interview with File out of the Orlando office, and the man from the Las Vegas office, when did those interviews take place?

A Beginning in July of 1971.

Q When did Mr. Dempsey first participate in any interviews or discussions?

A Could I answer your question first about the agents?

Q Sure.

A Mr. File would accompany me. We would go together to meet Mrs. Matthews beginning in July of 1971 up until — up until 1972, I believe, whenever I would meet Mrs. Roberts, there was always another agent with me.

Q Let me ask you this: As long as you have interjected that —

THE COURT: You forgot to ask him when he had the conversation with the FDLE agent.

Mr. LEVINE: I asked him that.

THE COURT: You never asked him when.

MR. LEVINE: I thought I did.

THE COURT: You didn't. When was the first time that she was interviewed by you and anybody representing the State of Florida, any law enforcement of the state?

THE WITNESS: On May 19, 1972.

THE COURT: In preparation for this trial?

THE WITNESS: Yes, sir.

THE COURT: Who was present from the state?

THE WITNESS: Agent Frank Troy, Agent Jeffery Monge.

Q That was by your choice or decision or Mr. Dempsey's choice and decision not to make her available for interview to that date.

A That was just that Mrs. Matthews was in protective custody, and it was hard to talk with her at that time. Prior to April 24, 1972, it was a decision of Mr. Dempsey and I made not to disclose her name to anyone out of the FBI and the Department of Justice.

Q You told us that Mr. Dempsey —

THE COURT: What was the reason for that decision?

THE WITNESS: For her protection.

Q You said that Mr. Dempsey participated in several interviews or conversations between yourself and Mrs. Matthews. Would you tell me when the first occasion as that that occurred?

A To give you an exact date —

THE COURT: Let me say, Mr. Levine, I have read the confidential reports in the FBI files which are not sealed, the ones we talked about yesterday.

MR. LEVINE: Yes, sir.

THE COURT: And there is absolute sound reason why, in my opinion, and I am so finding, on the basis of those reports which I am going to permit to be disclosed to you why the FBI and Justice Department would not reveal Mrs. Matthews' name or anything that she said to anybody connected with the state.

MR. LEVINE: I submit, Your Honor — I don't know what that is.

THE COURT: I say you are not privy to that information and I am not going to make you privy to it.

MR. LEVINE: I don't see that information —

THE COURT: I understand. I want you to know that I am considering what I read in some of those memoranda — what are they, 209's?

THE WITNESS: Yes, sir.

THE COURT: — in determining whether or not to believe Mr. Smith's testimony that Beverly Roberts Matthews' name was never disclosed to anyone connected with the State of Florida as being a confidental informant.

MR. LEVINE: I don't question his testimony in that regard.

THE COURT: In fairness to you —

MR. LEVINE: I accept his statements in that respect.

THE COURT: All right.

BY MR. LEVINE:

Q When was it that Mr. Dempsey first participated in the conversation between yourself and Mrs. Matthews?

A I don't recall the exact date. I would have to review all the memoranda —

Q What is your best recollection?

A It would be either late summer or early fall 1971.

Q It is fair to say that prior to the time you and Mr. Dempsey met with the Florida Department people on September 18 at his office to discuss the prospect of the United States of America taking over the total prosecution of

Q Sure

A In a case such as this, or in any case with this type of violation charged, the answer is no. But in this case —

Q Did you do it?

A May I answer your first question?

Q Yes.

A But in this case, because of the fact that it involved an investigative agency which wasn't affiliated with the United States, I did advise Mr. Briggs and I did advise Mr. Doug McMillan who is Chief of the District force in Miami, I advised them of what we intended to do, asking for their reaction. But I told them that we intended to prosecute.

Q When did you communicate that to those gentlemen?

A Well, it would have been —

Q Also, would you tell us what the form of the communication was?

A The form was telephone. I just called them up.

Q All right.

A It would have been after September 18, and not long afterward, and I might say that I told them that we intended to prosecute the individuals given to us by the Florida Department of Law Enforcement.

Q When you met with Mr. Miller September 18, you knew the result of that conversation or your prior information the fact that he was a man who was preparing in behalf of the Florida Department of Law Enforcement the applications and affidavits for submission to Governor Askew and to Justice Adkins, did you not?

A You mean on that date did he advise me that he was the person?

Q No. You knew it as a result either of that meeting or your prior information in that regard?

A Well, Mr. Levine. I had no — absolutely no prior information concerning the Florida Department of Law Enforcement investigation until that day, that Saturday.

THE COURT: September 18?

THE WITNESS: Yes, sir, September 18, 1971.

A (Continuing) And quite frankly, I don't know if he told me he was the one who prepared the affidavit. I know he didn't bring them, and I know I didn't see them. The meeting didn't last long. It was really, "Will you handle that prosecution?"

Q Did you advise him that you would; if so, how and when?

A I said I'd sure like to. I said there were certain things that we would have to consider, certain things that we should consider, and after we presented to him

— I presented to him what I thought were potential problems, as far as he was concerned, and I aired potential problems as far as we were concerned, I say we would be back in touch very shortly, and if he ironed out his problems and if our problems didn't appear insurmountable, I thought we would go ahead.

Q When did that meeting of minds ultimately firm up to a firm agreement or that discussion firm up to a firm agreement?

A I think I called him the following Tuesday — it wasn't long, a couple of days, work days.

Q Some time in the interim, you had to contact Mr. Briggs, the U. S. Attorney and District force man in Miami?

A Yes, sir, that's right.

Q As a result of the conversation within about a week and after the September 18 meeting, do I take it that you advised the representatives of the Florida Department of Law Enforcement that you were willing to take over the prosecution of these people and would proceed to do so?

A I suppose that that would be correct. My reason for hesitating is that, as you know or may not know, the Federal Bureau of Investigation had to make an independent decision. The Florida Department of Law Enforcement came to the U. S. Attorney's Office. They did not go to the Federal Bureau of Investigation. The Federal Bureau of Investigation did not decide simultaneously with our office. If we would have proceeded, we could have proceeded without the assistance, without the Federal Bureau of Investigation, and for a time that was contemplated. Now, I don't know when we decided that we were firmly and definitely going to prosecute the case, but it wasn't long after the conversation of September 18. But our decision was made, I know this, before the decision of the Federal Bureau of Investigation had decided to assist us.

THE COURT: When you say, "us," whom do you mean?

THE WITNESS: The U. S. Attorney's Office.

Q How much time elapsed between the time of your decision and the time that you were advised that the FBI would also play a role in this matter.

A Not long.

Q Days?

A Yes.

Q Just days, all right. Now, during the course of the investigation by the FBI before the September meeting

a proffer and we would like the opportunity after the fact to call Judge Adkins and Governor Askew

—

THE COURT: For what?

MR. LEVINE: In support of our proposition.

THE COURT: Which is?

MR. LEVINE: Can we cite the authority?

THE COURT: Just tell me what the proposition is.

MR. LEVINE: Could we have the application and the order in 71-07, Mr. Clerk, please?

THE CLERK: Yes, sir.

MR. DEMPSEY: Your Honor, this is the original stipulation. I will file it later but it is signed by all parties.

THE COURT: Do we have an original stipulation? It is filed right now. This will be filed. To the extent that anything is in that stipulation is to be communicated to the Jury, I will do the communicating. Do you understand?

MR. DEMPSEY: I do.

THE COURT: While he is looking, why don't you just tell me what your point is?

MR. LEVINE: Yes, sir. I don't know which

Q Mr. Smith, had Mrs. Roberts ever refused to testify as a witness in open Court in behalf of the Government?

A She had never refused. But in working with her, I realized that there was a great danger involved, and even her meeting us and the fact that her testimony would endanger her more, it was never really discussed. It was just sort of understood at that time.

Q You at that time contemplated using her, didn't you, as a witness?

A No, sir, I did not.

Q You did not?

A No, sir, I did not.

Q Had you and Mr. Dempsey had any discussions in that regard —

THE COURT: When?

Q Have you had any discussion in that regard; if so, tell us when.

THE COURT: You want to know when they discussed her potentiality as a witness.

MR. LEVINE: Yes, sir.

A It certainly wasn't until after September when we knew that there was a case that we could even consider her as a witness.

paragraph in the application the representation is made, but there is a representation made —

(An instrument is handed to counsel.)

MR. LEVINE: — in the application for the order which had been marked in pretrial as Government's Exhibit 17.

THE COURT: Tha is the Bill Fox telephone?

MR. DEMPSEY: Yes. The same general representation appears in each of these.

THE COURT: What is the representation?

MR. LEVINE: There is particularly the one that concerns me, and the other defendants' counsel. It is the seventh numbered paragraph on Page 13, if Your Honor —

(Hands to the Clerk.)

MR. LEVINE: Read that, please. And consistent with that, I address intercept wire communication Government's 18, and the fourth numbered findings —

THE COURT: I understand.

MR. LEVINE: Now, Your Honor will recall — I don't have a transcript of the matters taken up on the motion to suppress, but during the course of the proceedings that Phil Smith, according to my notes, took the stand and testified and testified to the effect that he learned of the tapes in advance, and that he assisted in the preparation of information for probable cause that gave rise to the taps.

Now I don't have an independent recollection as to whether or not he testified that he assisted in regard to the first numbered tap or not. The record — whatever the record says in that regard would be appropriate. The representation has been made by Agent Troy that all normal means of surveillance and investigation have been conducted, and a finding, a necessary finding in that regard was made.

It is clear now after the first time we learned it because Beverly Roberts' name had not been disclosed to us as a witness, and she would not talk to us. It is clear now that they had an informant who had his inside information on all aspects of at least the top echelon of the Blackburn organization as the Government produces it.

She may not know the people down below, but from Fox on up, and that is why I address myself to Fox 71-07 and 71-07-A. She had all of the

Q That's right, meaning after you knew that there was a case, after this meeting in September, you and Mr. Dempsey had occasion to disuss her potentiality as a witness, did you not?

A Yes, sir. I would put her time closer to October 27, 1971 when we talked with Mrs. Matthews.

Q What is there about that date that rings a bell in your mind?

A That is the date when the Florida Department of Law Enforcement made the arrest and served this search warrant at the conclusion of their wire intercept.

Q You waited until that occurred until such time as either you or Mr. Dempsey posed the specific question about her availability as a witness?

A We didn't wait until then. It was at that time we realized we had a case, we would bring in the financiers and people we have been trying to prosecute for years in the Orlando area, and we thought that if Mrs. Matthews at that time would assist us, we may be successgul in prosecuting these people.

Q How did you know at that time, what gave you the feeling at that time on October 27 that you could prosecute all of these people if you weren't privy to what the Florida Department was doing.

A By that time, we — I already worked — prior to October 27, I had discussions with some of the Florida Department of Law Enforcement officials. I also discussed it with Mr. Dempsey. Mr. Dempsey had a good understanding, or at least an understanding of what they had, an idea of what they had, and that as a basis we could perhaps bring in these other people.

Q And these discussions all would have gone on before the Fox tap was — the order for the Fox tap had been signed on October 1, and during the course of that Fox tap, is that not correct?

A No, sir. The discussions were not going on before the Fox intercept. They went on after that, and they were even through with the intercept.

Q But you had discussions before October 27, the day of the arrest, with the Florida Department and Mr. Dempsey about the effect of prosecution of all these people?

A The people that we asked Mrs. Matthews to testify against?

Q Yes.

A No, sir.

Q You asked Mrs. Matthews on October 27, or Mr. Dempsey in your presence, whether or not she would

(Argument)

information on the Fox-Blackburn total operation, and she testified to it here.

She never testified that as some time between her trial, which was in the early part of 1971 and July of 1971, she became an FBI informant.

Your Honor, the application in the Fox taps, 71-07 is dated October 1, 1971 at 71-07.

There are memorandums of interview that we would offer that predate this date and she had indicated that she had been an FBI informant prior thereto.

We would submit that as a matter of law, in the light of the fact they had an informant with a total knowledge of the Fox-Blackburn operation, the Fox taps 71-07 and 71-07-A are illegal as a matter of law, and that this representation by Agent Troy, with the aid and assistance and knowledge of Phil Smith is a false representation and a misrepresentation as a matter of fact. That there was never a representation made to Judge Adkins, and we would proffer to this, or to Governor Askew, that there was a confidential informant who had the total knowledge of the Fox-Blackburn operation. That if that representation had been made, the order would not have been signed saying that all — that the normal investigator procedures have tried and failed because they hadn't been fully tried, and they hadn't failed because they had total knowledge. We would submit to you, Your Honor —

MR. DEMPSEY: Instead making a proffer, could the defense counsel call any witness he wants so he can have a full and complete —

MR. LEVINE: I would like to do that.

THE COURT: I think we will go ahead and have it right now.

MR LEVINE: Yes. I don't have Judge Adkins under subpoena nor Governor Askew under subpoena.

THE COURT: What difference does that make?

MR. LEVINE: Because of the fact the question is whether or not any representations had been made to it on Beverly Matthews.

THE COURT: And representations made to him is in the affidavit.

MR. LEVINE: I would like to start by calling Philip Smith.

PHILIP SMITH

having been produced and first duly sworn, as a witness witness against all of these people that you were investigating, and she agreed?

THE COURT: That is not what he said.

MR. LEVINE: I thought that is what he said.

THE COURT: Why don't you let him put in his words? I want to hear what he's got to say, not what you have got to say.

Q What happened on October 27?

A. Mr. Dempsey and I had a meeting with Mrs. Matthews. We knew that she could furnish information in regard to Henry Finklestein, Joseph Louis Lanza, Anne Fusco, the financiers and individuals that were furnishing the money and giving the credit to Mr. Blackburn in his gambling operation.

Q You knew that because they previously made

statements to you and/or Mr. Dempsey and the other FBI agents about those people?

A Yes, sir.

Q All right. Go ahead

THE COURT: On that date.

A On that date, Mr. Dempsey approached her about — approached Mrs. Matthews about testifying in a case in Federal Court involving these individuals. Mr. Dempsey, I don't believe, went into detail or specifics about exactly what the case would be all about except the fact that her information in regard to these people would be something we need in the trial, and asked her if she would consent to testify.

A She said she would, yes, sir.

THE COURT: Any other questions?

MR. LEVINE: If I may just have a second, Your Honor. I don't think so.

Q Mr. Smith, before October 1, 1971, or the date that the order was signed for the Fox tap, the Federal Government had available to it as a viable witness, Pat McCormick, in regard to the Fox-Blackburn operation, did it not?

A You say as a viable witness. You mean someone who would telephone?

MR. DEMPSEY: I think live, I think that is what viable is.

THE COURT: That is.

MR. LEVINE: That is the Court's term, so I am using that term.

A He testified in other trials. I never approached him about testifying in any other cases after the Blackburn and Roberts' case.

Q You mean he was a paid — for how long had he been a paid informant to the FBI?

From 19 — I give you a rough — 1964 to about 1968.

Q And Mr. McCormick testified in the prosecution of Harlan Blackburn and generally related the general nature of his gambling operation and his activities in that regard?

A From 1964 through 1968.

Q And Mr. McCormick testified about Mr. Fox's participation and Mr. Blackburn's operation, as you recall it?

A I believe he said he was associated with the lottery operation. But I don't recall that he testified as to ihm having any knowledge of the bookmaking operation.

THE COURT: When did Mr. McCormick leave the Blackburn operation?

THE WITNESS:The spring of 1968.

Q Did Mr. Mcormick continue to provide nformation to the Federal Government after he supposedly left the Blackburn operaion about gambling or bolita and those sorts of criminal activities in he central part of the state?

THE COURT: You mean engaged by the defendants in this case?

MR. LEVINE: Defendants or anyone.

A If it was, it was historical. It was just what went on when he was there. He had no fresh information that he could furnish us because he was out of the operation as of the spring of 1968.

MR. LEVINE: I don't have any other questions of Mr. Smith.

MR. SIGMAN: I have one or two.

BY MR. SIGMAN:

Q Mr. Smith, just so I am clear in my mind, your statement is this, on October 27, 1971, you, Mr. Dempsey and Mrs. Beverly Roberts met together, and at that

time you agreed that she would be used as a witness in this case?

A She said she would testify on that date, yes, sir.

Q Prior to that date, had you had any discussion with her with reference to her availability as a witness?

A Actual discussion, no. As I said before, I realized, and so did she, that she was in a very precarious position in furnishing us information. and it was understood when you are working with a source, there are many things that are understood between the agent that is handling the informant or the source, and we never had an actual discussion about it. It was just understood at that time she certainly

(EXERPTS MR. DEMPSEY)

Q Were any of the interviews, to your knowledge, of Beverly Matthews recorded stenographically or by virtue of tape?

A Yes.

Q Could you tell me when that started?

A I would say it started on December 1, 1971. It was done at my request.

Q Was she interviewed in that fashion stenographically or by tape?

A By tape on two, possibly three times. I'm not sure.

Q Were those tapes ever transcribed?

A No, they were not transcribed.

Q Are the tapes in existence?

A No, they are not.

Q When and who destroyed them?

A I don't know when they were destroyed. They were destroyed at my request, and I think that Mr. Smith destroyed them.

Q Give me your best approximation as to when you had directed Mr. Smith to destroy those tapes.

A I told Mr. Smith that because of the fact — this will be my answer — because of the fact that Mrs. Roberts was speaking so rapidly and providing so much information, and he was having difficulty in getting everything that was meaningful down, and he was somewhat frustrated, that the best way to go about getting everything that she had to say down was to use a tape recorder. I said to him, "Get a tape recorder and get it on tape, and when you have a chance, put it on a piece of paper as you usually do, and dispose of the tapes."

Q My question to you was, when did you —

A I told him to do that at the same time. It would be in December.

Q In December?

A Right.

Q That was after you knew that she had already agreed to be a witness in this case, and the subject matter of those tapes related to some aspect of what she testified to here; is that right?

A That's right.

Q Do you know whether or not those tapes were reproduced in typed form or otherwise verbatim?

A I know they were not. You asked if there was a transcript of the tapes. There is none. There are no taped verbatim statements.

MR. LEVINE: I have no further questions of Mr. Dempsey.

(EXERPTS MR. SMITH)

that was fine, that I should erase them.

Q On the first occasion that you interviewed her in that fashion, how long an interview was that that you taped, approximately?

A Two hours, approximately. I don't really know the exact time.

Q And on the second occasion, how long an interview did you tape?

A I'd say approximately two hours — two to three hours.

Q Now, nowhere in the FD302 that you provided us is there any indication that you followed that procedure, is there?

A You mean the taping?

Q Yes.

A No, sir. There is not one that said I took notes on. I didn't set out that procedure. I used just the information she furnished to us.

Q In that regard, is it fair to say that you did not verbatim transcribe that which was on the tape?

A No, sir. I listened to the tape, correlated with my notes the information I received, and then would make detailed notes, and from those I would dictate to a steno who typed up the finished form of the interview.

A-114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

LOUIS B. PACHECO and
JOHN N. FOUNTAIN, JR.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Rule 33 of the Rules of this Court, on the 8th day of April, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, United States Department of Justice, Washington, D.C. 20530, and three additional copies were mailed to United States Attorney, Federal Building, Tampa, Florida. I further certify that all parties required to be served have been served.

ARNOLD D. LEVINE
725 East Kennedy Boulevard
Tampa, Florida 33602
Attorney for Petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1510

LOUIS B. PACHECO AND JOHN N. FOUNTAIN, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of operating an illegal gambling business involving five or more persons, in violation of 18 U.S.C. 1955 and 2, and conspiring to commit that offense, in violation of 18 U.S.C. 371. Petitioner Pacheco was sentenced to three years' imprisonment on each count, the sentences to run concurrently; execution of the sentence was suspended, and he was placed on three years' probation. Petitioner Fountain was sentenced to three years' imprisonment on each count, the sentences to run concurrently; execution of all but 150 days of his sentence was suspended, and he was placed on five years' probation. The court of appeals affirmed (Pet. App. A14-A38).

Petitioners were indicted along with 58 others in connection with an illegal gambling organization involving bookmaking and numbers operations in Florida.[1] Pacheco was one of the bookmakers involved in the business; he also accepted layoff bets from other bookmakers in the operation. Fountain was a financial backer of the operation, providing short term credit necessary to pay off bettors in bad weeks.

1. Petitioners contend (Pet. 14-24) that the district court should have suppressed evidence derived from wire interceptions conducted by the Florida Department of Law Enforcement (FDLE) pursuant to authorization by a justice of the Florida Supreme Court. They claim that the United States improperly withheld from the FDLE, and therefore from the Florida judge, information concerning the cooperation of an informant.[2] They argue that this information was required by 18 U.S.C. 2518(1) (c), which provides that an application for an order authorizing an interception must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed * * *."

The contention was properly rejected in the opinions of the district court (Pet. App. A9-A12) and the court of appeals (Pet. App. A34-A35), upon which we rely. The court

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[1]Fifty-two of the defendants pleaded guilty, one other was convicted on both counts, one was convicted only of the substantive count, one died, one had his case dismissed, and two had their cases severed for later trial.

[2]The investigation was handled originally by the Florida authorities. Later the United States agreed to prosecute the case (Pet. App. A28).

of appeals correctly concluded that "Mrs. Matthews' identity and information were known only to the United States, which was unaware of the Fox tap application until after it had been made and approved"; that Mrs. Matthews' life was, in any event, in such danger that the FBI would not have been required to disclose to the FDLE her name and the information she was giving; and that even if the FBI had known of the intercept application and even if Mrs. Matthews' life had not been in danger, disclosure would not have provided sufficient grounds to foreclose the authorization of an interception, because "there was no reason to suppose that Mrs. Matthews' information was sufficient for purposes of complete investigation of this case" (Pet. App. A35).

2. Petitioners contend (Pet. 25-29) that the district court should have stricken the testimony of a government witness, because the government failed to preserve two tape-recorded interviews of the witness and was therefore able to supply under the Jencks Act only written summaries made by the FBI agent who had interviewed the witness.

In July 1971, the witness, Mrs. Matthews, began furnishing information about the gambling operation to Special Agent Smith of the FBI. Between that time and the trial in May 1972, Mrs. Matthews was interviewed on a score or more occasions, and the information was noted on the standard FBI interview report. The interview reports relating to her trial testimony consisted of almost 100 pages, all of which were furnished to the defense before the witness testified.

Two of those interviews were tape-recorded for the purpose of ensuring accuracy in the written reports to be prepared by the interviewing agent. The prosecutor, who was present at the time of the interviews, suggested to the agent that he use a tape recorder. The prosecutor testified (Pet. App. A112):

> I told Mr. Smith that because of the fact * * * that [the witness] was speaking so rapidly and providing so much information, and he was having difficulty in getting everything that was meaningful down, and he was somewhat frustrated, that the best way to go about getting everything that she had to say down was to use a tape recorder. I said to him, "Get a tape recorder and get it on tape, and when you have a chance, put it on a piece of paper as you usually do, and dispose of the tapes."

Following the interviews, Agent Smith took the tapes and his notes back to his office, where he reviewed the notes for accuracy by listening to the tapes. From the tapes and original notes, he then dictated detailed notes which were later transcribed on the interview reports that were ultimately furnished to defense counsel (Pet. App. A113). The tapes were then reused (Tr. 613). The interview reports for those two sessions were approximately 30 pages long.

The sole purpose of making the recordings was to ensure completeness and accuracy in the final interview report. They were used only by Agent Smith and only to compare with his interview notes prior to dictating the interview report, so that he could ascertain whether he had included all of Mrs. Matthews' information accurately in the report.

Although we believe the better procedure would have been for the FBI agent to preserve the tape recordings for examination by counsel, it was not error for the district court to refuse to strike the testimony of Mrs. Matthews. There was no evidence that the tapes were destroyed to prevent their examination by petitioners. The extensive reports that were compiled from the tapes were confirmed as accurate by the witness and were made available

to petitioners' counsel. In these circumstances, there was no need to strike the witness's trial testimony. See *Killian* v. *United States*, 368 U.S. 231, 242; *Rosenberg* v. *United States*, 360 U.S. 367, 371.

3. Petitioners also contend (Pet. 9-14) that the district court should have granted their pre-trial motion to dismiss the conspiracy count of the indictment, because under "Wharton's Rule" they could not properly be charged with a conspiracy to conduct an illegal gambling business involving five or more persons. "To charge the defendants with both the substantive crime and the conspiracy to commit the crime would be grossly improper for the substantive offense cannot in law or fact be committed without a conspiracy" (Pet. 10).

Wharton's Rule, which has been referred to but never applied by this Court, states that "where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy" (*Gebardi* v. *United States*, 287 U.S. 112, 122). In our view, whatever validity Wharton's Rule may have in other contexts as a guide to legislative intent, it has no application in the case of Section 1955, particularly where, as here, the sentences for the substantive offense and the conspiracy are to run concurrently.

The application of Wharton's Rule in the context of 18 U.S.C. 1955 is at issue in *Iannelli* v. *United States*, No. 73-64, certiorari granted May 28, 1974, and the decision in that case may control the disposition of this case. We therefore believe that it would be appropriate to defer disposition of the present petition pending the decision in *Iannelli*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.